orders #1

ORDERS
OPINIONS
MEMORANDUMS
(MEMORANDA?)

(1)

2003066 "A"

supplemental

WF

b 6/504

9/14/10

IN THE MATTER OF JAMES G. HAMMOND	*	BEFORE THE
PETITIONER/LEGAL OWNER FOR A SPECIAL HEARING ON THE	*	BOARD OF APPEALS
PROPERTY LOCATED ON THE W/S OF FALLS ROAD 2,200 FEE NORTH OF BROADWAY	*	FOR
ROAD (11942 AND 11950 FALLS ROAD)	*	BALTIMORE COUNTY
8th Election District 3rd Councilmanic District	*	Case No.: 03-366-SPH

* * * * * * * * * * *

AMENDED ORDER OF THE BOARD OF APPEALS ON THE REMAND ORDER FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY

This matter comes before the Board on remand by Order of Judge Susan Souder, Circuit Court for Baltimore County, filed May 21, 2010, in which Judge Souder stated as follows:

> **"Although this Court believes that the Board of Appeals reached the right result, it cannot affirm when the result was reached in a legally incorrect way....**
>
> **On remand the County Board of Appeals should apply the correct test for equitable estoppel."**

Discussion

In order for the Board to articulate factual findings and to make specific rulings as to the correct test for equitable estoppel, this Board will incorporate into this Order, the Order of the Board that was signed on October 2, 2009, except for that section as noted on page eleven (11) of the aforementioned Memorandum Opinion filed by Judge Souder; wherein the Board finds that it erred in citing a legally incorrect argument.

The main task which the Circuit Court has assigned to the County Board of Appeals on remand is to make findings of fact and conclusions of law regarding the estoppel.

The Board's objection/denial of Hammond's claim of estoppel are both factual and legally correct. The doctrine of estoppel, involves a "theory of equitable estoppel applied in the context of zoning disputes." In this connection, "[I]t is used to achieve equitable results in zoning disputes between the government and its property owners." Relay Improvement Assoc. v. Sycamore Realty Co. 105 Md. App. 701, 723 (1995), aff'd *sub nom* Sycamore Realty Co. v. People's Counsel for Baltimore County 344 Md. 57 (1996):

> "The Court explained that the Court of Appeals has 'applied the doctrine of equitable estoppel in the context of zoning matters' only 'rare occasions ...."

The more recent decision of Marzullo v. Kahl 366 Md. 158 (2002) reiterates that the estoppel doctrine does not, as a rule, apply to allow avoidance of zoning law based on reliance of mistaken information or even permits issued by officials. In brief, the law charges persons dealing with public officials with knowledge of the law and the extent of their authority. Moreover, the law does not allow public officials to give away the legal rights of the public whether intentionally or by mistake. Petitioner Hammond's estoppel claim thus must fall to the principle that estoppel does not apply against the public. As a corollary, Hammond may not avoid the law to the detriment or prejudice of interested citizens in the neighborhood.

When a property owner places the legality of his use in litigation by petition for special hearing, it functions as an acknowledgement that no vested rights exist as a matter of law. This is settled by the recent case of Antwerpen v. Baltimore County 163 Md. App. 194 (2005); see Powell v. Calvert County 368 Md. 400 (2002).

BCZR 104.1 allows nonconforming uses to exist unless changed, abandoned or discontinued. BCZR 104.2 addresses fire or other casualty situations. As the County Board of

Appeals recognized in their Order dated October 27, 2003, the policy of the law is to eliminate nonconforming uses over time. The Gardner case, *supra*, 293 Md. 259, at 267-68 states:

> "This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses. In *Grant v. Mayor and City Council of Baltimore,* 212 Md. 301, 307, 129A.2d 363, 365 (1957), this Court said:
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> "Nonconforming uses have been a problem since the inception of zoning. Originally they were not regarded as serious handicaps to its effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property owners at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun. Nevertheless, the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned, and the ordinances forbid or limit expansion of nonconforming uses and forfeit the right to them upon abandonment of the use or the destruction of the improvements housing the use."
>
> Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *The Arundel Corp. v. Board of Zoning Appeals of Howard County,* 255 Md. 78, 83-4, 257 A.2d 142, 146 (1969); *Stieff v. Collins,* 237 Md. 601, 604, 207 A.2d 489, 491 (1965); *Colati v. Jirout,* 186 Md. 652, 655, 657, 47 A.2d 613, 614-15 (1946); *Beyer v. Mayor of Baltimore,* 182 Md. 444, 446, 34 A.2d 765, 766 (1943); *See Kastendike v. Baltimore Ass'n for Retarded Children, Inc.,* 267 Md. 389, 397, 297 A.2d 745, 749-50 (1972).
> Whether a nonconforming use can be changed, extended, enlarged, altered, repaired, restored, or recommenced after abandonment ordinarily is governed by the provisions of the applicable local ordinances and regulations. *Feldstein v. La Vale Zoning Board,* 246 Md. 204, 211, 227 A.2d 731, 734 (1967); *Phillips v. Zoning Comm'r of Howard County,* 225 Md. 102, 109, 169 A.2d 410, 413 (1961); *Board of Zoning Appeals of Baltimore County v. Gue,* 217 Md. 16, 21-22, 141 A.2d 510, 513 (1958). These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses. *Mayor of Baltimore v. Byrd,* 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati,* 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore,* 180 Md. 88, 96, 23 A.2d 15, 18 (1941); *see City of Hagerstown v. Wood,* 257 Md. 558, 563, 263

A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County,* 220 Md. 48, 59, 151 A.2d 144, 150 (1959)."

The law does not favor a change in the nonconforming use by a kind of "creeping" process. Phillips v. Zoning Commissioner or Howard County 225 Md. 102 (1961). A property owner must prove both continuity and persistence of the same nonconforming use. A change or extension may come quickly or slowly. Calhoun v. County Board of Appeals of Baltimore County 262 Md. 265 (1971). In general, the law does not favor nonconforming uses and contemplates their gradual disappearance. Prince George's County v. E.L. Gardner, *supra.*

Recently, in Marzullo, *supra*, *Id* at 194-99 (2002), the property owner made the estoppel argument, to wit, that it was "fundamentally unfair" to enforce the law because he had obtained a building permit and constructed his "reptile barn." In rejecting this argument, Judge Cathell quoted Lipsitz v. Parr, 164 Md. 222, 164 A. 743 (1993) at length and added an insightful discussion of Town of Berwyn Heights v. Rogers 228 Md. 571 (1962):

> "In *Town of Berwyn Heights v. Rogers*, 228 Md. 271, 179 A.2d 712 (1962), Phillip Rogers, a home builder, began construction of a residence in Berwyn Heights. Mr. Rogers had not started construction until he had received building permits from both the county's building inspectors and the Town of Berwyn Heights'[fn15] inspectors. The construction was in compliance with the permits; however, the Town of Berwyn Heights concluded that a mistake had been made in the issuance of the permits so that the residence was being built in violation of a zoning ordinance. The Town of Berwyn Heights filed suit to enjoin the construction of Mr. Rogers.
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> Mr. Rogers alleged that the Town of Berwyn Heights was estopped from filing suit because it and the county had issued Mr. Rogers building permits, and Mr. Rogers had expended substantial amounts of money in partially constructing the residence. The Court held that:
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> > "Some authorities hold that the principle of estoppel does not apply against a city, but the majority rule is to the effect that the doctrine of estoppel in pais is applied to municipal, as well as to private, corporations and individuals, at least where the acts of its officers are within the scope of their authority and justice and right requires that the public be estopped. And it has been held that municipalities may be estopped by reason of the issuance of permits. However, the cases and text-

> writers very generally state that a municipality is not estopped to set up the illegality of a permit. And the issuance of an illegal permit creates no `vested rights' in the permittee. *We have held above that the permits issued to the appellee were in violation of the zoning ordinance; consequently they were unlawful and* Page 199 *did not estop the appellant [the Town of Berwyn Heights] from prosecuting this suit."*
>
> *Id.* at 279-80, 179 A.2d at 716 (citations omitted) (emphasis added).

> While we are sympathetic to the plight in which respondent has found himself, we hold that the county is not estopped from enforcing the BCZR as it was applied by the Board of Appeals. We have held, generally, that permits that have been issued that are in violation of the zoning ordinances are unlawful and cannot be grounds for estopping a municipality from the enforcement of the ordinance. We stated in *Lipsitz* that "the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." *Lipsitz,* 164 Md. at 227, 164 A. at 746."

In light of the case law, there is no foundation here to support an argument about "estoppel." The Board of Appeals reiterates that these types of claims are not legitimate and are unacceptable. Where the facts and law do not support a petition, there is no excuse for an "estoppel" argument. This is particularly true where the property owner initially circumvented the available special hearing process, which would have provided due process of law for all parties. In resorting to and obtaining an informal "spirit and intent" letter of approval to "reestablish" an earlier use, Petitioner attempted to gain leverage and seek immunity for impermissible expansion of a nonconforming use. This is unacceptable.

In Marzullo, *supra, Id* at 194-99 (2002), Judge Cathell rejected the property owner's assertion of estoppel. There, the property owner ostensibly had much more to rely on than in the present case. As in Marzullo, there is no vested right to an illegal use.

The law of "estoppel" is not applicable either factually or as a matter of law. The advice given by Lloyd Moxley was limited to the potential reestablishment of the original nonconforming use. In any event, the law does not allow a county official to authorize more than is allowed by law, and any permit or purported authorization for an illegal use would be invalid.

A petitioner has a right to a use which predates zoning law or has a valid permit and substantial construction prior to a change in the zoning law which otherwise would prohibit it. Here, the right is to a nonconforming use for a country store. There has been no change in the law in this case.

Decision

The history of this case extends from its inception in February of 2003. The particular facts and procedural history are already set out in detail, not only in previous opinions of the Circuit Court for Baltimore County (specifically its opinion dated July 7, 2004 and March 21, 2007 and May 21, 2010, the later being that which remands this case to us today) as well as the extensive history provided in the Opinion of Judge Hollander in the Court of Special Appeals decision concerning this matter noted in appeal number 00980 September Term, 2004.

In Judge Susan Souder's May 21, 2010 remand for reconsideration of the equitable estoppel issue, Judge Souder believed "that the Board of Appeals reached the right result (Page 12)," but was not satisfied with the CBA's reasoning. In addition, the Court resolved the vested rights issue, affirming the Board's determination that Hammond has no vested rights. However Moxley's letter may be interpreted, equitable estoppel does not protect a violation of the zoning law governing the use of this property. It would be against the public interest and rule of law to perpetuate an illegal expansion or extension of the nonconforming use. The Maryland law is settled that this terminates the nonconforming use.

This Board believes it clearly reached the right result in its October, 2009 opinion and Judge Souder believes that the Board reached the correct decision, but needed to apply the correct test. In this Opinion, the Board has articulated in greater detail and scope the reasons for

the conclusion it has reached and believes it has applied the correct test for determining if equitable estoppel exists in this matter.

Accordingly, this Board finds unanimously, that the doctrine of equitable estoppel does not apply to the benefit of Mr. Hammond.

ORDER

IT IS THEREFORE this 14th day of September, 2010, by the Board of Appeals of Baltimore County

ORDERED that, in accordance with the MEMORANDUM OPINION of the Honorable Susan Souder, Judge, Circuit Court for Baltimore County, filed May 21, 2010, for further proceedings consistent with the opinion, the Board finds that Equitable Estoppel does not apply in this case, and it is further

ORDERED that, Mr. Hammond's request to continue operations as he has, be and is hereby **DENIED.**

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*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence M. Stahl, Panel Chairman

Edward W. Crizer, Jr.

Maureen E. Murphy

9/14/10

County Board of Appeals of Baltimore County

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September 14, 2010

John C. Murphy, Esquire
516 N. Charles Street, Ste 206
Baltimore, MD 21201

Peter M. Zimmerman, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

RE: *In the Matter of: James Hammond-Legal Owner/Petitioner-* Case No.: 03-366-SPH

Dear Counsel:

Enclosed please find a copy of the *Amended Order of the Board of Appeals on the Remand Order from the Circuit Court for Baltimore County* issued this date by the Board of Appeals. This Amended Opinion is issued for the purpose of correcting a clerical error on page seven (7), first paragraph, to reflect the final decision reached by the Board as stated in the Order on page seven (7) of that Opinion and Order. The sentence beginning with 'Accordingly,' is amended to read as follows:

> Accordingly, this Board finds unanimously, that the doctrine of equitable estoppel does not apply to the benefit of Mr. Hammond.

The balance of the Opinion and Order as issued by the Board on September 2, 2010 remains unchanged.

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*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Theresa R. Shelton
Administrator

/trs
Enclosure: Amended Order of the Board of Appeals on the Remand Order from the Circuit Court for Baltimore County

Duplicate Original Cover letter

c(w/Encl.): James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
William J. Wiseman, III, Zoning Commissioner
Arnold F. "Pat" Keller, III, Director/Planning
Paul Mayhew, Assistant County Attorney
Timothy Kotroco, Director/PDM
Nancy West, Assistant County Attorney
John E. Beverungen, County Attorney

9/2/10

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> **On remand the County Board of Appeals should apply the correct test for equitable estoppel."**

Discussion

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> While we are sympathetic to the plight in which respondent has found himself, we hold that the county is not estopped from enforcing the BCZR as it was applied by the Board of Appeals. We have held, generally, that permits that have been issued that are in violation of the zoning ordinances are unlawful and cannot be grounds for estopping a municipality from the enforcement of the ordinance. We stated in *Lipsitz* that "the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." *Lipsitz,* 164 Md. at 227, 164 A. at 746."

In light of the case law, there is no foundation here to support an argument about "estoppel." The Board of Appeals reiterates that these types of claims are not legitimate and are unacceptable. Where the facts and law do not support a petition, there is no excuse for an "estoppel" argument. This is particularly true where the property owner initially circumvented the available special hearing process, which would have provided due process of law for all parties. In resorting to and obtaining an informal "spirit and intent" letter of approval to "reestablish" an earlier use, Petitioner attempted to gain leverage and seek immunity for impermissible expansion of a nonconforming use. This is unacceptable.

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Decision

The history of this case extends from its inception in February of 2003. The particular facts and procedural history are already set out in detail, not only in previous opinions of the Circuit Court for Baltimore County (specifically its opinion dated July 7, 2004 and March 21, 2007 and May 21, 2010, the later being that which remands this case to us today) as well as the extensive history provided in the Opinion of Judge Hollander in the Court of Special Appeals decision concerning this matter noted in appeal number 00980 September Term, 2004.

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This Board believes it clearly reached the right result in its October, 2009 opinion and Judge Souder believes that the Board reached the correct decision, but needed to apply the correct test. In this Opinion, the Board has articulated in greater detail and scope the reasons

for the conclusion it has reached and believes it has applied the correct test for determining if equitable estoppel exists in this matter..

Accordingly, this Board find unanimously, that the doctrine of equitable estoppel applies to the benefit of Mr. Hammond.

ORDER

IT IS THEREFORE this 2nd day of September 2010, by the Board of Appeals of Baltimore County

ORDERED that, in accordance with the MEMORANDUM OPINION of the Honorable Susan Souder, Judge, Circuit Court for Baltimore County, filed May 21, 2010, for further proceedings consistent with the opinion, the Board finds that Equitable Estoppel does not apply in this case, and it is further

ORDERED that, Mr. Hammond's request to continue operations as he has, be and is hereby **DENIED.**

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*.

BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence M. Stahl, Panel Chairman

Edward W. Crizer, Jr.

Maureen E. Murphy

9/2/10

County Board of Appeals of Baltimore County

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410-887-3180
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September 2, 2010

John C. Murphy, Esquire
516 N. Charles Street, Ste 206
Baltimore, MD 21201

RE: *In the Matter of: James G. Hammond – Legal Owner/Petitioner*
Case No.: 03-366-SPH

Dear Counsel:

Enclosed please find a copy of the Order of the Board of Appeals on Remand from the Circuit Court for Baltimore County issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Theresa Shelton/kc

Theresa R. Shelton
Administrator

TRS/klc
Enclosure

c: James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
Office of People's Counsel
William J. Wiseman, III, Zoning Commissioner
Timothy Kotroco, Director/PDM
Arnold F. "Pat" Keller, III, Director/Planning
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3/ /10
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PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

August 2, 2010

Lawrence M. Stahl, Esquire, Chairman
County Board of Appeals
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

RECEIVED
AUG 02 2010
BALTIMORE COUNTY
BOARD OF APPEALS

Re: Petition for Special Hearing
11942 & 11950 Falls Road
James M. Hammond – Petitioner
Case No.: 03-366-SPH
County Board of Appeals Remand deliberation date: August 17, 2010 at 12 p.m.

Dear Chairman Stahl,

The upcoming August 17 County Board of Appeals (CBA) deliberation is to address Judge Susan Souder's May 21, 2010 remand for reconsideration of the equitable estoppel issue. Remarkably, Judge Souder believed "that the Board of Appeals reached the right result (Page 12)," but was not satisfied with the CBA's reasoning. At the same time, the Court resolved the vested rights issue, affirming the CBA's determination that Hammond has no vested rights.

People's Counsel's position, as a matter of law, is that Hammond's claim of equitable estoppel is entirely without merit. First of all, Lloyd Moxley's letter did not give Hammond "wrong advice," despite the CBA's *dictum* in its October 2, 2009 opinion. Moxley just referred to the scope of the nonconforming use allowed by Zoning Commissioner Haines in his 1988 decision. There was nothing wrong with that. Moxley never gave Hammond permission to expand the nonconforming use illegally in the way he did. Rather, Hammond misused the letter as a *carte blanche* opening to take unfair advantage, with detrimental impacts on neighboring residents. There was no reasonable reliance on his part to justify such excessive activity.

Secondly, in any event, however Moxley's letter may be interpreted, equitable estoppel does not protect a violation of the zoning law governing the use of this property. It would be against the public interest and rule of law to perpetuate an illegal expansion or extension of the nonconforming use. The Maryland law is settled that this terminates the nonconforming use.

We explained our position in detail on pages 5-18 of the enclosed memorandum filed in Circuit Court in March, 2010. We discussed Hammond's claims on pages 5-7; the CBA's October 2, 2009 observations on pages 7-8; the Hammond-Moxley correspondence and reliance issue on pages 8-9; the overriding public interest in enforcement of the zoning law, and Maryland cases, on pages 9-13; the reasons why Permanent Financial does not support Hammond's argument, on pages 13-15; similarly, the reason why Sycamore Realty case does not support his claim, on pages 15-17, and a postscript on pages 17-18.

We believe our reasoning contributed to Judge Souder's belief that the CBA reached the right result. We hope that the CBA will consider and substantially adopt our reasons as it reviews this case one more time.

As a footnote, the Court of Special Appeals (Raker, J, specially assigned) mentioned equitable estoppel recently in Baiza v. College Park 192 Md. 321, 335-36 (2010). Judge Raker's observations about the law and cases are consistent with and support our position.

In sum, the CBA did clearly reach the right result in its October, 2009 opinion. If not, Judge Souder would likely have reached a different conclusion. All that is necessary is for the CBA to articulate the palpable reasons. We hope this letter and our identification of the relevant sections of our Circuit Court memorandum will assist the CBA in this effort. We also reiterate that under BCZR 104.1, consistent with Judge Souder's previous decision, the expansion of the nonconforming use terminated the nonconforming use. See our memorandum, page 21.

In conclusion, the CBA should reiterate its denial of James Hammond's petition for special hearing and request to continue operations, with the additional specific ruling that the CBA must reject his equitable estoppel claim and that, in combination with the sequence of earlier Circuit Court rulings, the nonconforming use has terminated. This may finally bring closure to this protracted litigation.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

PMZ/rmw
Enclosure

cc: John C. Murphy, Esquire, Attorney for Petitioner (w/o enclosure)
Barbara Jung, neighbor and protestant (w/o enclosure)
Paul Mayhew, Assistant County Attorney (w/o enclosure)

MEMORANDUM OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, The Jefferson Building, 105 W. Chesapeake Avenue, Suite 204 , Towson, MD 21204 in support of its response to the	*	IN THE
PETITION FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY The Jefferson Building, 105 W. Chesapeake Avenue, Suite 203 , Towson, MD 21204	*	CIRCUIT COURT
IN THE MATTER OF THE APPLICATION OF **JAMES G. HAMMOND** FOR A SPECIAL HEARING for property located on the W/S of Falls Road, 2,200' N of Broadway Road (11942 & 11960 Falls Road) 8th Election District, 3rd Councilmanic District	*	FOR
	*	BALTIMORE COUNTY
Case No. 03-366-SPH before the County Board of Appeals of Baltimore County	*	Civil No. 03-C-09-013065

* * * * * * * * * * * * *

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY'S MEMORANDUM

The Time Frame of the Hammond Trilogy

This protracted zoning litigation began seven (7) years ago, in 2003. Upon Petitioner James Hammond's petition for judicial review of the County Board of Appeals' (CBA's) October 27, 2003 decision, the Court of Special Appeals (COSA) issued a detailed remand opinion on November 15, 2005. Hammond I. There ensued memoranda, oral argument, deliberation, and a second CBA decision on September 28, 2006. This time, there were petitions for judicial review filed by Hammond, People's Counsel and Barbara Jung *pro se*. Judge Susan Souder reversed the CBA decision on March 21, 2007 and also ordered another remand. Hammond II. There was no appeal of this decision. The third time around, the CBA issued its most recent decision on October 2, 2009. Hammond III. Once again, Hammond has requested judicial review.

The Hammond II Reversal and Remand; the Hammond III CBA Proceedings

Judge Souder's 2007 opinion resolved the question of whether Hammond's lawnmower business use or venture is a lawful intensification of a nonconforming use or

an unlawful extension. Based on the record, she determined that his changes in use were an unlawful extension. Opinion pages 7-10. Her Order reversed the CBA's finding that Hammond's lawnmower business was a lawful intensification.

At the same time, Judge Souder framed a remand for the remaining issues,

> "As the issues have not previously been the subject of any findings and for the reasons stated in the 2005 COSA Opinion pp. 54-55, on remand the Board should consider Hammond's estoppel and vested rights claims."

This accorded with Judge Hollander's instructions in Hammond I, pages 51-57,

> "Without a ruling from the Board, we are unable to conduct our judicial review function. Therefore, on remand, in the event that the Board determines that appellant's business is not a lawful intensification, it should proceed to address appellant's estoppel and vested rights contentions, and determine whether they apply here to protect appellant." Page 55.

After Judge Souder's 2007 remand, the CBA took some time before it scheduled a public deliberation. The change in membership of the CBA panel contributed to this delay. Panel Chairman Lawrence Stahl remained from the 2003 panel. Edward Crizer continued from the 2006 panel. Maureen Murphy came on the 2009 panel to replace Margaret Brassil, who had joined the 2006 panel, but then left the Board. The COSA has approved the substitution for departed panel members in People's Counsel for Baltimore County v. County Ridge Shopping Center 144 Md. App. 580 (2002).

The CBA scheduled a public deliberation on the remand for June 11, 2009. Our office sent a letter on June 1 to describe the posture of the case and enclose a portion of a previous memorandum on the subject.

The CBA rejected Hammond's claims that the estoppel and vested rights doctrines afforded him the right to operate his expanded business operation. On October 2, 2009, the CBA issued its written opinion. Petitioner Hammond thereupon filed this latest petition for judicial review. The case now comes to the Circuit Court for the third time.

The County Board of Appeals Hammond III Opinion

The CBA articulated its decision at pages 2-3 of its remand opinion,

> "The Board has reviewed the opinion of the Court of Special Appeals in this matter and the insight of that Court with regard to estoppel and vested rights claims.

Petitioner Hammond had relied on a letter from Mr. Moxley, an employee of Baltimore County that he could in fact utilize the property as he desired and as a result the County would be estopped from the changing their mind at this time. The Appellate Court noted with approval language explaining that the "doctrine of equitable estoppel cannot defeat a municipality's enforcement of its own ordinances because of an error of it's agent on which a third may have relied." (Hammond v. Jung, Court of Special Appeals of Maryland, Number 00980, November 15, 2005, 53.) The Court further noted that "the law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the County official, zoning estoppel does not apply." (Id. at 53).

The Board feels that this is not an uncommon situation, nor unreasonable that a County employee could be unintentionally wrong as to advice. We find no evidence to indicate that Mr. Moxley acted in any way that would indicate that he was being arbitrary, capricious or egregious in giving the advice; therefore, the Board does not believe that equitable estoppel is available to save Mr. Hammond's claim.

The related doctrine of vested rights is "derived from principles of common and constitutional law..." *Relay Improvement Association v. Sycamore Realty Company, Inc,* 105 Md. [App.] 701, (1995), aff'd 344 Md. 57, (1996) (Hammond v. Jung, Court of Special Appeals of Maryland, Number 00980, November 15, 2005). It further states: "a landowner may rely on nothing other than a properly issued permit, and that a substantial change in circumstances will not be found unless the landowner begins actual above ground construction." Relay, at 725. (Hammond v. Jung, Court of Special Appeals of Maryland, Number 00980, November 15, 2005). The Court in Hammond, supra, noted with approval that the evidence indicated that Mr. Hammond had relied on the advice of Mr. Moxley as opposed to a validly issued permit and that in any event, there was not a change in the zoning classification of the property. Without these circumstances, vested rights would not apply. This Board has determined that absent those circumstances, and without a valid permit having been issued for construction, the doctrine of vested rights does not apply to the benefit of Mr. Hammond.

DECISION

Accordingly, this Board find unanimously, that neither the doctrine of equitable estoppel nor vested rights apply to the benefit of Mr. Hammond. "

Argument

Scope of Judicial Review

The Court of Appeals wrote in Trinity Assembly of God v. People's Counsel for Baltimore County 407 Md. 53, 77-78 (2008),

> "When reviewing the decision of a local zoning body, such as the Board, we evaluate directly the agency decision, and, in so doing, we apply the same standards of review as the circuit court and intermediate appellate court. *People's Counsel for Balt. County v. Loyola College in Md.*, 406 Md. 54, 66, 956 A.2d 166, 173 (2008). "Our function ... is not to substitute our assessment of the facts for those of the Board ..., but merely to evaluate whether the evidence before the Board was 'fairly debatable'...." *Pemberton v. Montgomery County*, 275 Md. 363, 367-68, 340 A.2d 240, 243 (1975). Nevertheless, we "may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." *United Parcel Serv., Inc. v. People's Counsel for Balt. County*, 336 Md. 569, 577, 650 A.2d 226, 230 (1994) (quoting *United Steelworkers of America AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 669, 472 A.2d 62, 64 (1984)).
>
> The scope of judicial review of administrative fact-finding is a narrow and highly deferential one. *Loyola College*, 406 Md. at 66, 956 A.2d at 173. Accordingly, we will affirm a decision on the facts if it is supported by "substantial evidence." *See id.* at 67, 956 A.2d at 173; *People's Counsel of Balt. County v. Surina*, 400 Md. 662, 681, 929 A.2d 899, 910 (2007); *see also Pemberton*, 275 Md. at 367, 340 A.2d at 243. A conclusion by a local zoning board satisfies the substantial evidence test if "a reasonable mind might accept as adequate" the evidence supporting it. *Loyola College*, 406 Md. at 67, 956 A.2d at 174 (quoting *Surina*, 400 Md. at 681, 929 A.2d at 910).
>
> Our review of the legal conclusions of a local zoning body, such as the Board, is less deferential, and we "may reverse those decisions where the legal conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *Surina*, 400 Md. at 682, 929 A.2d at 910. Nevertheless, "a degree of deference should often be accorded" the legal conclusions of an administrative agency regarding statutes, ordinances, or regulations that the agency is tasked with administering. *Id.* (quoting *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169, 177 (2001)). Thus, in analyzing whether the Board's decision was premised on an erroneous legal conclusion, we should take into consideration the relevant expertise of the Board. *See Loyola College*, 406 Md. at 67, 956 A.2d at 174; *Surina*, 400 Md. at 682-83, 929 A.2d at 911; *see also Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68, 729 A.2d 376, 380 (1999).

Introduction: the Special Hearing process

The "Special Hearing" process under BCZR §500.7 is effectively an administrative law cousin to the declaratory judgment process in the judicial system. Antwerpen v. Baltimore County 163 Md. App. 194, 209 (2005). It is a public process, which requires submission of a site plan, public notice, an opportunity to be heard, and a public hearing and written decision, with appeal rights. Here, Hammond's petition requested a determination that his use was within the scope of the nonconforming use recognized in Zoning Commissioner (ZC) Robert Haines' 1988 decision. This called for application of the law to the facts. It did not in any way involve a change in the law.

The County's request, which precipitated Hammond's petition, likewise did not involve change in the law. Rather, as the situation on the ground emerged, County officials realized there were serious questions whether Hammond's actual use was a permissible "reestablishment" of the earlier nonconforming use. In asking Hammond to file a petition for special hearing, the County offered the opportunity for a public hearing and procedural due process of law to determine if Hammond's use was legitimate.

Remarkably, Hammond's Petition did not assert any equitable estoppel or vested rights claims. These issues emerged in the 2003 CBA proceedings.

It should be underlined that Antwerpen not only gave a helpful description of the special hearing process, but also provided important guidance about vested rights. The COSA there held that no vested rights accrue during the pendency of the special hearing litigation. The COSA relied on Powell v. Calvert County 368 Md. 400 (2002). After a thorough discussion, Judge Salmon summarized,

> "We agree with the Board that *Powell* controls this case. In *Powell*, the Court of Appeals gave its imprimatur to the general rule that 'vested right[s] [do] not come into being until the completion of any litigation involving the zoning ordinance from which the vested right is claimed to have originated.'' 163 Md. App. at 210.

Here, the enduring pendency of the special hearing litigation is by itself a basis to reject the vested rights claim. There are additional reasons to conclude that Hammond never acquired such rights. We shall return to this subject in Section II on vested rights.

I. The equitable estoppel claim is without merit

a. Hammond's claims

Hammond based his claims on ZC Haines' 1988 decision and the April 20, 2001 "spirit and intent" letter issued by zoning staff member Lloyd Moxley. Hammond had written to Arnold Jablon, Director of Permits and Development Management what he described as a "Letter of Spirit and Intent." in order to "clarify and reestablish the nonconforming use certification ..." His letter "...propose[d] to reestablish the lawn mower sales and service operation and continue the additional uses listed below." He wrote that on April 6, 2001 he had reviewed ZC Haines' decision and "... consulted with planners on duty that day." He then listed the uses he understood were permitted: "Lawn

mower sales and service, Plant and tree sales and Christmas tree sales, Gasoline sales, Deli/convenience store, and Gift shop."

On April 20, 2001, Planner Lloyd Moxley replied. He noted that the property was at this time zoned R.C. 4 (Watershed Protection), and that the uses allowed on the property were "as permitted and restricted" by ZC Haines' decision. He described this as having "*...approved the following non-conforming use on said property, country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale.*"

Judge Hollander had summarized Hammond's contentions, at COSA pages 51-52,

> "Appellant contends that he 'is entitled to the use by reason of vested rights or estoppel," because "of the change in the County's position.' He asserts:
>
> > 'The Haines ruling clearly held that lawn mower sales and service was permitted under the aegis of the country store use. The subsequent decision of the Board of Appeals and the Circuit Court held, contrary to the Haines ruling, that the lawn mower sales and service was a separate non-conforming use and lapsed if not used. The Moxley letter constituted a written determination that the lawn mower sales and service was permitted without any qualifications. Then, after a community group raised objections, Moxley changed his mind and advised that only lawnmowers purchased on the site could be repaired. The Board of Appeals went far beyond the Moxley change of mind and held, contrary to the Haines ruling and the Moxley letter, that the use had expired.
> >
> > Hammond's acquisition of the property and a year's worth of work did not take place in a vacuum. He relied on Moxley's letter. And Moxley himself did not just sit down and dream up his response. He in turn relied on the Haines ruling, particularly the order which he literally re-stated.'
>
> "According to appellant, 'where a [zoning law] change occurs, persons who have ... relied on the prior zoning by obtaining a permit and doing work in reliance on that permit are protected . . . by the Maryland law of vested rights/estoppel.' He also maintains that he has vested rights in the lawn mower sales and service business because of the substantial construction that he undertook. In particular, he points out that he 'replaced electrical and plumbing, put in a roll down door, haul away 30-40 truckloads of demolition materials, and removed the greenhouse.' As Hammond points out, appellee conceded as much, agreeing that Hammond 'worked like a dog' to get the place ready.'"
>
> "In a related argument, appellant contends that the doctrine of 'estoppel' applies here. Apart from his reliance on Moxley's assurances, he states: 'Since Haines had the authority to make the ruling, the correct zoning was as set forth in his ruling, up until the

time a different ruling was made by the Board of Appeals. The zoning was changed. All the elements are there for the application of vested rights/estoppel.'"

Judge Hollander also summarized Barbara Jung's position, at COSA 52-54,

"Appellee counters that vested rights and estoppel 'are two distinct doctrines.' She explains: 'The law of vested rights applies only in situations where a property owner is issued a permit by the County and in good faith reliance on that permit begins substantial construction that is visible to the public.' Jung adds that the 'property owner obtains a vested right in continuing construction even when the county subsequently changes the zoning classification on the subject property.'"

"According to appellee, however, the 'factual situation in the present case is not suited to a defense of vested rights because Mr. Hammond relied on the advice of Mr. Moxley not on a validly issued permit and there was not a change in the zoning classification of the property.' She asserts: 'Both are essential elements for the defense of vested rights.'"

"Moreover, Jung maintains that the doctrine of equitable estoppel cannot defeat a municipality's enforcement of its own ordinances because of an error of its agent, on which a third party may have relied. In this regard, she observes: 'Maryland County have been reluctant to recognize estoppel in the area of zoning.' Noting that '[a]dministrative negligence is not enough,' appellee also asserts: 'The law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the county official, zoning estoppel does not apply.' In appellee's view, there was no evidence that Moxley 'acted in an arbitrary, egregious or capricious manner.'"

"In addition, appellee contends that appellant "should certainly been [sic] on notice that Mr. Moxley was no infallible." In deed, she suggests that appellant "relied on that advice at his own peril." According to Jung, Hammond

> 'could have requested a hearing by the Zoning Commissioner prior to purchasing the property pursuant to Baltimore County Zoning Regulation 550.7 [sic, 500.7] to clarify the permissible use of the property. He could have consulted an attorney. He could have read the Opinion and seen the restrictions himself.'"

While arguably related, they actually involve different theories, as Judge Hollander also recognized at pages 54-55. For different reasons, both of these claims must fail based on the undisputed facts. We shall first address the equitable estoppel claim.

b. Preliminary discussion of the Hammond III CBA opinion

The CBA wrote that Hammond relied on "unintentionally wrong advice" from zoning staff employee Lloyd Moxley. Nevertheless, the CBA held that this did not entitle him to continue a use in violation of the zoning law.

As we shall show, Moxley's advice was not wrong, but rather stated in a general way. Hammond's letter to the zoning office and Moxley's reply together reflect that the approval was limited to resumption of the use approved in ZC Haines' 1988 decision. Hammond misconstrued and exaggerated the advice to serve his purposes. The CBA thus gave Hammond more credit than he deserved as to reliance.

In any event, as a matter of law, the CBA correctly decided that even if Hammond relied on faulty staff advice, it did not afford or justify any estoppel or vested rights claim. Because Hammond's actual use turned out to be an impermissible extension of the original nonconforming use, Moxley would have had no authority to approve an illegal use by letter or any other means. Moxley's letter reflects the view of one zoning staff member. It does not even have the legal status of a building permit, which is reviewed by many agencies, and which also is subject to the zoning law.

c. The Hammond-Moxley correspondence; there was no reasonable reliance

Despite Hammond's ultimate use of the special hearing process, he contended that Moxley's April 20, 2001 "spirit and intent" letter "estops" the county or anyone else from denying his proposed use. In other words, he claimed that even if his proposed use is illegal, he is immune from challenge because he relied on Moxley's letter. This argument is without merit.

The key paragraph in Moxley's letter states in its entirety,

> "Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case. 89-204-SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, *country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses." (emphasis in original).

In the context of Hammond's stated desire to "clarify and reestablish" the earlier use, Moxley's description covered only the uses described and approved by ZC Haines in Case No. 89-204-SPH. It did not give Hammond *carte blanche* to modify, expand, and extend those uses under the guise or umbrella of lawnmower sales and service. For example, it did not cover any potential enlargement of the area used for lawnmower sales

and service, new facilities, or addition or expansion of repair equipment and machinery with greater impact on the neighborhood. So, Hammond did not have a reasonable basis to rely on this letter to justify the extended scope of his particular use.

Under these circumstances, the CBA's characterization of Moxley's letter as "unintentionally wrong" is inaccurate. Rather, Hammond exaggerated the scope of its allowance. The most that can be said in any critique of Moxley's letter is that it did not describe in detail the limitations of ZC Haines' decision, the constraints of nonconforming use law, and the prohibition of extensions. On the other hand, Hammond's request was so informal and general as to invite a general response.

d. There is a public interest in the correct enforcement of zoning law; as a matter of law, even if Hammond relied on wrong advice, it does not justify an estoppel claim.

Anyway, the CBA rightly decided that even if Moxley's "advice" were "unintentionally wrong," it did not afford legal protection for an unlawful extension of a nonconforming use. It has been settled law for over 70 years that county departments have no authority to approve or permit a use which conflicts with applicable zoning law. Mistaken approvals cannot stand. Even if a property owner were to undertake major construction in reliance upon an approved building permit, it would not save or afford a defense for an unlawful use.

This principle applies with even more force where a property owner has submitted a vague "spirit and intent" request instead of utilizing the public special hearing process. Hammond's initial avoidance of the special hearing process is particularly inexcusable here because ZC Haines' 1988 decision came about in this very process and reflected the intense interest of area citizens in the limited scope and extent of the nonconforming use. In this historical context, Hammond's letter had an *ex parte* quality. His singular perception of justice left no room for his neighbors or the public in general.

The Court of Appeals has consistently rejected such equitable estoppel arguments. In Cromwell v. Ward 102 Md. App. 691, 724-25 (1995), Judge Cathell explained,

> "In the case of *Lipsitz v. Parr*, 164 Md. 222, 164 A. 743 (1933), a case seeking injunctive relief by way of a restraining order, a city officer mistakenly issued a building permit for an ice factory when the statute prohibited ice factories. The Court there held:

> A municipality may be estopped by the act of its officers if done within the scope and in the course of their authority or employment, but estoppel does not arise should the act be in violation of law. . . . [T]he ordinance forbade the officials . . . to grant the permit which the plaintiff asked and obtained. . .
>
> . . . [I]t was therefore unlawful for the officers . . . to grant the permit, and it would be unlawful for the licensee to do what the purporting permit apparently sanctioned. A permit thus issued . . . does not . . . prevent the permit from being unlawful nor from being denounced by the municipality because of its illegality. . . . *Every one dealing* with the officers and agents of a municipality *is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled* by their acts when done without legal authority.
>
> So, even where a municipality has the power, but has done nothing, to ratify or sanction the unauthorized act . . . it is not estopped by the unauthorized or wrongful act of its officer . . . in issuing a permit that is forbidden by the explicit terms of an ordinance. . . . *Valentine v. Rds. Directors*, 146 Md. 199, 206 [126 A. 147] [(1924)]. . . . [Citations omitted, emphasis added.]

164 Md. at 227-28, 164 A. 743.

> The Court cited *Lipsitz* in *Inlet Associates v. Assateague House Condominium Assoc.*, 313 Md. 413, 545 A.2d 1296 (1988), a case seeking specific performance and injunctive relief, and also cited *City of Hagerstown v. Long Meadow Shopping Center*, 264 Md. 481, 287 A.2d 242 (1972), a case of a timely appeal of the denial of a building permit. In *Inlet Associates*, the Court opined that "[c]onsequently, '[e]veryone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority.'" 313 Md. at 437, 545 A.2d 1296. The Court added: "[T]he doctrine of equitable estoppel 'cannot be . . . invoked to defeat the . . . enforcement of . . . ordinances, because of an error or mistake committed by one of its officers . . . which has been relied on by the third party to his detriment.'" *Id.*"

The City of Hagerstown case deserves discussion. There, based on his understanding of past city policy, the building inspector gave the construction company president a letter, stating that no building permit would be required to build a movie theater in the shopping center. The company obtained a permit from the County Tax Assessor, had architectural work done, obtained utility permits and a motion picture license, and entered into a contract to destroy the existing store and construct the theater. Demolition work commenced, but was interrupted when the building inspector informed

the company that a demolition permit would be required, and that a building permit would be required after all. Then, despite the company's substantial expenditures and a lease agreement with a tenant for theater space, the building inspector denied the permits. Upon appeal to the Board of Appeals, the Board determined that the theater was not an allowable use within the zoning district. The Board also rejected the estoppel argument, finding that the building inspector must follow the zoning code and that any form of permission would have been *ultra vires*. The Circuit Court reversed, citing "... the peculiar and unique circumstances of this case, ..." 264 Md. at 489. The city appealed. As ordered, the building inspector issued a permit, work resumed pending appeal, and after $200,000 in expenditures, the theater opened.

In turn, the Court of Appeals reversed the Circuit Court. Judge Finan instructed that estoppel could not be based on a nebulous administrative policy which conflicts with zoning law. 264 Md. at 490-97. Without an ordinance authorizing the use, the city could not be "estopped" from enforcing the zoning law. Moreover, the "policy" was not based on any reasonable longstanding interpretation of an ambiguous statute. The Court recognized the sympathetic position of the shopping center because of its reliance on "faulty advice." However, to accept the hardship argument "... would unsettle a principle of law which has become stabilized in this jurisdiction by application in many cases." 264 Md. at 493. The Court quoted Lipsitz v. Parr 164 Md. 222 (1933) and Town of Berwyn Heights v. Rogers 228 Md. 571 (1962), added a series of cases from Maryland and other states, and cited an American Law Reports annotation. 264 Md. at 494-97. Quoting McQuillin, Municipal Corporations, the Court underlined,

> "'* * * In issuing a permit officials are discharging a governmental function, and the city and its citizens cannot be bound or estopped by the unauthorized acts of its officers in pursuance of that function. Indeed, the doctrine of estoppel will not be invoked, even though a substantial amount of work had been done on the property without official interference.' McQuillin, Municipal Corporations, Vol. 8, s 25.153, at 489 (1965 rev. Vol.)."

Subsequently, in Marzullo v. Kahl 366 Md. 158, 194-99 (2002), Kahl argued it was "fundamentally unfair" to enforce the law against his "reptile barn" because he had obtained a building permit and proceeded to construction. The Court disagreed. Judge

Dale Cathell quoted from Inlet Associates and Lipsitz, *supra*, and then discussed Town of Berwyn Heights v. Rogers, *supra*,

> "In *Town of Berwyn Heights v. Rogers*, 228 Md. 271, 179 A.2d 712 (1962), Phillip Rogers, a home builder, began construction of a residence in Berwyn Heights. Mr. Rogers had not started construction until he had received building permits from both the county's building inspectors and the Town of Berwyn Heights' inspectors. The construction was in compliance with the permits; however, the Town of Berwyn Heights concluded that a mistake had been made in the issuance of the permits so that the residence was being built in violation of a zoning ordinance. The Town of Berwyn Heights filed suit to enjoin the construction of Mr. Rogers.
>
> Mr. Rogers alleged that the Town of Berwyn Heights was estopped from filing suit because it and the county had issued Mr. Rogers building permits, and Mr. Rogers had expended substantial amounts of money in partially constructing the residence. The Court held that:
>
> > "Some authorities hold that the principle of estoppel does not apply against a city, but the majority rule is to the effect that the doctrine of estoppel in pais is applied to municipal, as well as to private, corporations and individuals, at least where the acts of its officers are within the scope of their authority and justice and right requires that the public be estopped. And it has been held that municipalities may be estopped by reason of the issuance of permits. However, the cases and text-writers very generally state that a municipality is not estopped to set up the illegality of a permit. And the issuance of an illegal permit creates no 'vested rights' in the permittee. *We have held above that the permits issued to the appellee were in violation of the zoning ordinance; consequently they were unlawful and did not estop the appellant [the Town of Berwyn Heights] from prosecuting this suit."*
> > *Id.* at 279-80, 179 A.2d at 716 (citations omitted) (emphasis added).
>
> While we are sympathetic to the plight in which respondent has found himself, we hold that the county is not estopped from enforcing the BCZR as it was applied by the Board of Appeals. We have held, generally, that permits that have been issued that are in violation of the zoning ordinances are unlawful and cannot be grounds for estopping a municipality from the enforcement of the ordinance. We stated in *Lipsitz* that "the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." *Lipsitz*, 164 Md. at 227, 164 A. at 746."

It should be kept in mind that there is a public interest in enforcement of the law. There are many citizens who rely on public officials to implement the law correctly. The present case highlights this point because there are a number of area citizens whose rights have been impaired by Hammond's illegal actions. To illustrate, Ms. Jung and the Falls

Road residents should not suffer an infringement of their rights as a result of the actions of Hammond and Moxley, regardless of the relative faults of these two actors.

In sum, Marzullo reiterates that the equitable estoppel doctrine does not, as a rule, apply to allow avoidance of zoning law based on reliance of mistaken information or even permits issued by officials. The law charges persons dealing with public officials with knowledge of the law and the extent of their authority. Moreover, the law does not allow public officials to give away the legal rights of the public whether intentionally or by mistake. As a corollary, Hammond may not avoid the law to the detriment or prejudice of interested citizens in the neighborhood.

e. Permanent Financial does not support Hammond's claims

Property owners seeking to invoke equitable estoppel invariably focus on Permanent Financial Corp. v. Montgomery County 308 Md. 239 (1986) to rationalize their position. They also invariably omit and ignore the long line of cases from Lipsitz to Marzullo. Hammond takes this path.

Permanent Financial reflects that rare occasion where the Court has opened a very narrow window. Pursuant to a building permit, the developer undertook construction of an office building. Eight and a half months and two million dollars later, the County suspended the permit and issued a stop work order because of conflicts with the zoning law. The developer appealed.

The case actually involved several claims. First of all, the developer argued that its penthouse was exempt from the applicable height controls. The Court sustained the zoning board's finding that the penthouse was clearly subject to such controls, and there was no estoppel.

Secondly, the developer claimed that its fourth floor office space qualified as allowed "nonhabitable" space. The County, to the contrary, argued that this referred to space occupied by utility and mechanical appurtenances. The zoning board had agreed with the County and held the law to be clear. But Judge John McAuliffe observed for the Court that the statute was ambiguous and, further, that the County had a longstanding consistent reasonable written interpretation contemporaneous with the ordinance, which

agreed with the developer's view. On this basis, the Court allowed "narrowly" for the application of estoppel. 308 Md., at 249-53.

Thirdly, there were claims relating to the floor area ratio and setbacks. The Court resolved these against the developer, again reinforcing the narrow applicability of the estoppel doctrine. 308 Md. at 253-57.

Suffice it to say that the present case has nothing in common with the fourth floor height interpretation issue which gave rise to equitable estoppel in a portion of Judge McAuliffe's opinion. There is no longstanding reasonable written interpretation of a statute. Rather, there is here a single generally worded staff letter citing a Zoning Commissioner decision confirming the prior operator's nonconforming use. Hammond then misused the letter to launch a new business of much greater magnitude, which turned out to be an illegal extension of the nonconforming use.

Shortly after Permanent Financial, the Court of Appeals described its limited scope. Inlet Associates v. Assateague House Condominium 313 Md. 413 (1988). The case involved an illegal city council resolution conveying to a developer a public right of way in part of a dedicated street, together with riparian rights. In reliance on this resolution, the developer acquired a substantial property for a hotel/marina complex, spent between one and two million dollars in project costs, obtained site plan approval and permits, and even a height variance for a hotel. Subsequently, as the process evolved, there emerged opposition. The legality of the initial council resolution came under scrutiny. There ensued a complaint by taxpayers and area property owners to enjoin the project. The Court of Appeals ultimately found that the city charter prohibited conveyance of the public property by resolution, and that there was no equitable estoppel to protect the developer.

As the developer relied heavily on Permanent Financial, the Court discussed it at length. 313 Md. at 434-40. Judge Robert Murphy wrote at 313 Md. 436,

> "The facts in *Permanent Fin.* indicated that a developer who had undertaken construction of a building sought relief from the county's suspension of its building permit and the imposition of a stop work order. The dispute involved whether a height restriction contained in the county code, which allowed additional height for "nonhabitable structures" permitted the top floor of the building to be used for offices.

> The code provision was subject to at least two reasonable interpretations. The county had shared the builder's interpretation at the time it issued the building permit and consistently applied that interpretation for a significant period of time. We held that since the builder had expended substantial funds in reliance upon the county's long-standing interpretation of the code provision, which was a reasonable and debatable interpretation, it would be inequitable to permit the county to then apply a different rule in that case.
>
> Unlike *Permanent Fin.*, the present case does not turn on the ambiguity vel non of a county ordinance which was subject to two reasonable interpretations."

Judge Cathell quoted this last sentence in Marzullo v. Kahl, 366 Md. at 194. So far as we can tell, the appellate courts have never again had occasion to apply Permanent Financial to accept another equitable estoppel claim.

f. The Sycamore Realty opinions do not support Hammond's claims

Hammond relies on the Court of Appeals decision in Sycamore Realty Co. v. People's Counsel for Baltimore County 344 Md. 57 (1996) and criticizes the County Board of Appeals citation of the Court of Special Appeals opinion, Relay Improvement Ass'n v. Sycamore Realty Co. 105 Md. App. 701 (1995).

Our office argued this case in the appellate courts. It involved primarily the novel issue of "zoning estoppel" as well as vested rights. There, developer Sycamore sought to invalidate a county legislative rezoning on equitable grounds. Sycamore had proceeded through the subdivision process when the County placed an 18-month reservation on the property for potential acquisition for public park use. The acquisition did not happen. When the County Council subsequently downzoned the property's residential density, Sycamore argued that the reservation had unfairly prevented it from moving forward to approval, permits, construction, and thereby vested rights. Both the Court of Special Appeals and Court of Appeals rejected the zoning estoppel and vested rights claims, albeit for different reasons.

There entered into the discussion of "zoning estoppel" the better understood doctrine of equitable estoppel in order to see whether the policies underlying this doctrine might be useful. It was this discussion to which Judge Hollander referred in her opinion. Here is COSA Judge Davis's analysis in Sycamore, at 105 Md. App. 722-24,

> "Although Maryland has never endorsed Heeter's broad, black-letter version of zoning estoppel, the Court of Appeals has applied a similar principle in cases involving equitable estoppel against a government entity. *See Inlet Associates v. Assateague House*, 313 Md. 413, 434-36, 545 A.2d 1296 (1988) (explaining that municipal estoppel may be found where a party has "changed his [or her] position for the worse" in good faith reliance on actions undertaken by government officials, provided that those actions are within the scope of their lawful authority). *See also Permanent Financial Corp. v. Montgomery Cty.*, 308 Md. 239, 518 A.2d 123 (1986); *City of Hagerstown v. Long Meadow Shopping Center*, 264 Md. 481, 287 A.2d 242 (1972); *Town of Berwyn Heights v. Rogers*, 228 Md. 271, 179 A.2d 712 (1962); *Lipsitz v. Parr*, 164 Md. 222, 164 A. 743 (1933); 3 J. Pomeroy, Equity Jurisprudence § 804 (5th ed. 1941) (discussing the general principle of equitable estoppel).
>
> On rare occasions, the Court of Appeals has applied the doctrine of equitable estoppel in the context of zoning matters. In *Crane*, 277 Md. at 207, 352 A.2d 786, for example, the Court of Appeals concluded that the city was "estopped from attempting to enforce" a 1971 zoning ordinance because of the Cranes' "substantial change in position." We think it essential to note, however, that the Court's decision was based on principles of contract rather than property.[FN7] *See Crane*, 277 Md. at 210, 352 A.2d 786 (explaining that "[t]his case should not be confused with those in which a property owner contends that he has a vested right in an existing zoning classification").
>
> In *Permanent Financial*, 308 Md. at 239, 518 A.2d 123, Montgomery County issued a permit for construction of a building that violated certain height restrictions. After four floors had been built to a height of forty-three feet, the County obtained a stop work order. The Court of Appeals held that the County was estopped from requiring the developer to remove the fourth floor. The Court stressed, however, that the decision to issue the permit was consistent with the County's long-standing practice, and was based on a reasonable, good-faith interpretation of an ambiguous provision in the County's building code. *Id.* at 250-52, 518 A.2d 123. Although the Court framed the issue as one of estoppel, the facts are consistent, in most respects, with the vested rights rule. In effect, the Court merely recognized a narrow exception to the general requirement that a developer's rights may not be vested in the absence of a valid permit."

The Court of Appeals affirmed the CSA decision. While the high court provided different reasons, it did not criticize or disturb Judge Davis' description of equitable estoppel. Judge Chasanow surveyed equitable estoppel briefly, at 344 Md. 66,

> "The instant case, however, does require us to examine the issue. Generally, courts are loath to impose estoppel against the government when it is acting in a governmental capacity. *Salisbury Beauty Schools v. St. Bd.*, 268 Md. 32, 63-64, 300 A.2d 367, 385-86 (1973). A few exceptions exist in Maryland, however. For example, in *City of Baltimore v. Crane*, 277 Md. 198, 352 A.2d 786 (1976), we held that Baltimore City was "estopped from attempting to enforce [a comprehensive] zoning ordinance" because the Cranes, in accepting an offer from the City, had changed their position substantially enough that they acquired a vested contractual interest in the existing zoning. 277 Md. at

> 207, 352 A.2d at 790. *See also, e.g., Permanent Fin. Corp. v. Montgomery Cty.*, 308 Md. 239, 518 A.2d 123 (1986) (holding county equitably estopped from imposing zoning ordinance's height controls where builder designed and constructed building in reliance on building permit and long-standing, reasonable interpretation by county as to how to calculate height)."

Judge Chasanow's opinion then turned to a discussion of zoning estoppel and vested rights, rejecting each of Sycamore's claims. The discussion of vested rights is also consistent with our argument in Section II, below.

To summarize, the discussion of equitable estoppel in both Sycamore Realty opinions reinforces the legal analysis presented here. While the CBA might have included a more detailed analysis and description of the history of the case law to support its conclusion, its opinion is good enough. The bottom line is that the CBA came to the proper legal conclusion on this record, the only conclusion consistent with the law.

g. Postscript

Judge Hollander wrote that the estoppel claim here (page 54), involves a "theory of equitable estoppel applied in the context of zoning disputes." As stated, "[I]t is used to achieve equitable results in zoning disputes between the government and its property owners." It is a "legal defense," but, as Judge Hollander recognized, citing Relay Improvement Assoc. v. Sycamore Realty Co. 105 Md. App. 701, 723 (1995), aff'd *sub nom* Sycamore Realty Co. v. People's Counsel for Baltimore County 344 Md. 57 (1996):

> "The Court explained that the Court of Appeals has 'applied the doctrine of equitable estoppel in the context of zoning matters' only on 'rare occasions ....'"

Plainly, this is not one of those rare occasions for the application of this doctrine.

There is a lesson here. The special hearing procedure is frequently employed by property owners who desire a secure form of declaratory judgment before commencing operations. It allows for public notice and opportunity to be heard and a quasi-judicial determination. Hammond should have filed such a petition, with detailed plans, before commencement of operations. Because of the limited scope of ZC Haines' opinion and the strictures of nonconforming use law, Hammond's superficial inquiry to secure "spirit and intent" approval for his new and different business venture was necessarily

problematic. His request to "clarify and reestablish" the earlier nonconforming use mutated into a play for leverage for an impermissible extension of the use.

II. There Is No Legitimate Vested Rights Claim

The estoppel and vested rights claims are actually quite different. An equitable estoppel claim seeks to defend and perpetuate an illegal use. A vested rights claim seeks protection for a legal use affected by an adverse change in the zoning law.

Vested rights claims often arise where building or development projects are in process at the time of passage of a zoning law which prohibits the use or otherwise restricts the project. The traditional Maryland rule is that the developer must have a valid building permit and proceed to substantial above-ground construction in order to acquire vested rights. The Court of Appeals reviewed the case law in Prince George's v. Sunrise Dev. LP 330 Md. 297, 306-14 (1993). The Court stated the law more concisely in Prince George's County v. Collington Corporate Center I LP 358 Md. 296, 306 (2000).

Occasionally, property owners attempt to conflate the estoppel and vested rights doctrines. This occurred in Sycamore Realty, *supra*, where the developer argued for a "zoning estoppel" based on the allegation that a County reservation delayed the acquisition of vested rights. As we have seen, the Court rejected that claim and, among other things, discussed the strict limitations on equitable estoppel. Judge Howard Chasanow also explained that the acceptance of "zoning estoppel" would undermine the framework of the Maryland vested rights doctrine.

More on point, Marzullo v. Kahl 366 Md. 158 (2001) included a vested rights claim in the mix with equitable estoppel. We shall review this in detail below. Before doing that, we shall discuss vested rights in the context of nonconforming use law.

The essence of nonconforming use law is to protect the vested rights to a mature ongoing, and operational use affected by an adverse change in the law. Judge Rita Davidson explained this in Prince George's County v. E.L. Gardner 293 Md. 259, 267-69 (1982). As this Court observed in Hammond II, nonconforming use law does not allow for or protect changes which extend the nonconforming use. In other words, there are no vested rights to an extension of a nonconforming use. The Court of Appeals revisited

nonconforming use law and quoted Gardner with approval in Purich v. Draper Properties 395 Md. 694, 709-11 (2006).

Here, ZC Haines' 1988 decision confirmed the legitimacy of the nonconforming country store, with the incidental intensification of the lawnmower sales and service then operated by the Dolds. But he could not and did not confirm or allow vested rights to any extension of the use. Neither did Moxley's letter purport to allow for any extension. He had no such authority. Again, the prerequisite to a vested rights claim is that the use be legal. An extension of a nonconforming use is fundamentally illegal.

In the present case, there was no change in the law when Hammond embarked on his new venture. The changes came about in Hammond's operation. Remarkably, in Hammond I, the CBA accurately noted in 2003,

> "... the [Moxley] letter in no way altered the facts or the applicable statutes and law in this case."

This Court's 2007 Hammond II decision determined that the changes constituted an illegal extension. Again, it is elementary that there are no vested rights to such an extension.

This brings us back to Marzullo v. Kahl *supra*. Judge Cathell rejected not only Kahl's assertion of equitable estoppel, but also his claim of vested rights. 366 Md. at 191-94. As noted earlier, Kahl had obtained a building permit. He argued that this entitled him to use his the property for a facility to raise, breed, and keep reptiles or snakes. Here is what the Court said about vested rights,

> "Respondent contends that he has obtained a vested right to use his property to raise, breed, and keep reptiles or snakes. In his brief, respondent states that in order for him to have a vested right he must satisfy two prongs. The first prong is that there has to be a valid permit. The second prong is that substantial work has to be performed under the permit so that it would be discernable to a member of the general public that work under the permit was occurring. Respondent states that he has satisfied both of the prongs and has a vested right to use the property for his business. Respondent fails to properly apply the prongs and to understand the circumstances of when a vested right occurs.
>
> We examined the law of vested rights in Prince George's County v. Sunrise Development Limited Partnership, 330 Md. 297, 623 A.2d 1296 (1993). In *Sunrise*, we stated that:

> 'The third stream of cases involves the issue of vested rights, per se. By a per se vested rights case we mean one invoking 'that 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 the earlier zoning, we borrowed from the law of nonconforming uses the concept of public knowledge in the neighborhood of the use, saying:
>
> > 'In Maryland it is established that in order to obtain a "vested right" in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use. *See* Feldstein v. LaVale Zoning Board, 246 Md. 204, 210, 227 A.2d 731, 734 (1967), indicating that [*Mayor & City Council v.*] *Shapiro*[, 187 Md. 623, 51 A.2d 273 (1947)] as well as Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 A.2d 747 (1939), established as one of the tests for determining the existence of a nonconforming use "is whether such use was known in the neighborhood.' 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)."330 Md. at 312-13, 623 A.2d at 1303-04 (alteration in original); *see* Sycamore Realty Co., Inc v. People's Counsel for Baltimore County, 344 Md. 57, 67, 684 A.2d 1331, 1336 (1996).

In the case *sub judice*, respondent obtained a permit and completed substantial construction; however, he is not entitled to have a vested right because

there has been no change, applicable to his case, in the zoning law itself and the permit was improperly issued. When respondent obtained his permit and started construction, the BCZR was the same as when petitioners filed for a hearing before the Zoning Commissioner. The Zoning Commissioner and later the Board of Appeals were not making a subsequent change to the BCZR, they were just interpreting the BCZR as it was already enacted. Based on the decision of the Board of Appeals that we are affirming, respondent's permit was not a lawful permit because he could not lawfully conduct his business in an R.C.4 zone.

Respondent did not satisfy the first prong because his permit was not proper. Additionally, he was not being subjected to a subsequent change in the zoning regulations. Generally, in the absence of bad faith on the part of the remitting official, applicants for permits involving interpretation accept the afforded interpretation at their risk. Therefore, respondent has not obtained a vested right to conduct his business on the property." Emphasis supplied.

The situation is very similar here. Hammond misunderstands "... the circumstances of when a vested right occurs." The nonconforming use law here is the same now as it was when Hammond made his 2001 inquiry. It has not changed.

There is no vested right to an unlawful use. Hammond's use turned out to be an extension of the original nonconforming use. Mr. Moxley could not authorize such a use even if that were the import of his letter, intended or unintended. It would undermine the nonconforming use and vested rights law to justify such an extension.

If Hammond had continued or intensified the actual nonconforming use, then his use would be still be legal and vested. That was its limit. But this Court has correctly found that Hammond launched an impermissible extension.

As a result, the nonconforming use has terminated, consistent with the prevailing nonconforming use doctrine in Maryland. BCZR §104.1 states, in this regard,

> "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."

III. Summary: Estoppel and Vested Rights

The "estoppel" doctrine is not applicable as a matter of law. The advice given by Lloyd Moxley was limited to the potential reestablishment of the original nonconforming

use. In any event, Moxley could do no more. The law does not allow a county official to authorize more than is allowed by law, and any permit or purported authorization for an illegal use would be invalid.

Neither does the law of vested rights afford Hammond any right to the illegal extension of a nonconforming use. A property owner has a right to a use which predates a zoning law which otherwise would disallow it. He has vested rights if there is a valid permit and substantial construction prior to that adverse change in the zoning law. Here, the right was to a nonconforming use for a country store under the parameters set in Commissioner Haines' opinion and order.

There has been no change in the law in this case. Neither Lloyd Moxley's letter nor any subsequent County action involved any change in the law. The issue has been and remains the same. There is no "vested right" to an unlawful extension of a nonconforming use.

Conclusion

For all of the above reasons, the Circuit Court should affirm the CBA's October 2, 2009 decision to deny Petitioner James Hammond's request to continue operations based upon estoppel and vested rights.

/S/
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/S/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2010, a copy of the foregoing People's Counsel for Baltimore County's Memorandum was mailed first class mailed, postage prepaid to Barbara Jung, 11939 Falls Road, Cockeysville, MD 21030, Paul Mayhew, Assistant County Attorney, Office of Law, 400 Washington Avenue, Towson, MD 21204 and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, Attorney for Petitioner.

/s/
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

5/21/10

IN THE MATTER	*	IN THE
OF JAMES G. HAMMOND	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	CASE NO: 03-C-09-13065

* * * * * * * * * * * *

MEMORANDUM OPINION

Property owner James G. Hammond ("Hammond) has requested judicial review of the October 2, 2009 Order of the County Board of Appeals hereinafter referred to as ("CBA") denying his request to continue certain operations on his property.

FACTS

A succinct factual summary was set forth in this Court's 2004 Opinion on pages 3-4 in Case No. 03-C-03-012458. The unreported 2005 Opinion of the Court of Special Appeals in this matter also contains a Factual Summary. See pages 1-28, No. 00980, September Term 2004, James G. Hammond v. Barbara R. Jung, filed November 15, 2005, Exhibit E to Hammond's Memorandum, "2005 COSA Opinion".

In summary, a country store was located on the property at issue at one time. The country store was a nonconforming use. Intensification of that nonconforming use, that is, a lawn mowing sales and service operation, was approved and lasted a number of years before ending. By an undated letter to the Director of the Department of Permits and Development Management ("DPDM") Hammond then sought to confirm approval for "reestablishment"of a lawn mower sales and service business before purchasing the

property. Exhibit A to Hammond's Memorandum[1], the letter references "Recertification/Clarification of non-conforming use (SPH 89-204)". In response, Hammond received a letter" dated April 20, 2001 from DPDM (referred to as the "Moxley letter", Exhibit B to Hammond's Memorandum) which stated in part:

> Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, the Commissioner approved the following nonconforming uses On said property, *country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales, and accessory lawn and garden supplies and equipment for sale.*

The Moxley letter referred to the so-called Haines decision, Case No. 89-204 SPH. Satisfied with the Moxley letter, Hammond purchased the property.

PROCEDURAL SUMMARY

In 2003, Hammond then filed a Petition for Special Hearing with the Zoning Commissioner,

> to approve the clarification that lawn and garden equipment sales and services are allowed on the subject property with service of equipment not being limited to the products sold on site and to amend the prior orders in Case No. 89-204-SPH and 94-14-SPH.

After a hearing, the Deputy Zoning Commissioner issued a decision in 2003 interpreting the Haines decision to mean that repair of lawn mowers on the subject property was restricted to mowers purchased on the site. (Exhibit C to Hammond's Memorandum) Hammond took an appeal. The Board of Appeals conducted a *de novo* hearing and issued an opinion in 2003 finding that the nonconforming use for lawn mowers approved in the Haines decision had lapsed by operation of law since it had not been conducted

[1] Hammond's provision of these various Orders in this case was very helpful in considering the tortuous history of this matter.

since 1989. (Exhibit D to Hammond's Memorandum) The Circuit Court affirmed that decision in 2004. (Case No. 03-C-03-012458)

In 2005 the Court of Special Appeals vacated the judgment of the Circuit Court and remanded the matter. The Court of Special Appeals determined that the country store was the nonconforming use, not the lawn mower business, and that it remained a lawful nonconforming use.

The Board of Appeals issued an opinion in 2006 pursuant to the remand without hearing. That opinion approved the lawn mower sales and service operation with conditions as a lawful intensification of the nonconforming use approved in the Haines decision. Appeals were filed by Hammond, People's Counsel, and neighboring property owner, Barbara Jung.

This Court then concluded that there was no substantial evidence to support the Board's 2006 decision, and so the Order was reversed in 2007 [2]. (Exhibit G to Hammond's Memorandum) Consistent with the 2005 appellate decision, this Court also remanded the case for consideration of Hammond's estoppel and vested rights claims.

On October 2, 2009 the County Board of Appeals rejected Hammond's estoppel and vested rights claims; (Exhibit H to Hammond's Memorandum) and, he sought judicial review. The People's Counsel and Jung participated in this proceeding in support of the Board's decision. Oral arguments were presented at a hearing on April 2, 2010.

[2] The Board of Appeals appears to have erroneously concluded that this Court's 2007 decision that there was no substantial evidence to support the decision finding a lawful intensification meant automatically that there was an unlawful expansion of the non-conforming use. No party appealed that conclusion; and so, it is not before this Court.

QUESTION PRESENTED

Whether the decision of the County Board of Appeals denying the property owner's claims of estoppel or vested rights is legally correct.[3]

STANDARD OF REVIEW

A final decision of an administrative agency must be upheld on review if it is not premised on an error of law and the factual conclusions are reasonably based on the facts proven. Regarding findings of fact, the reviewing court cannot substitute its judgment for that of the agency and must accept the agency's conclusions if they are based on substantial evidence and if reasoning minds could reach the same conclusion based on the record. *Friends of the Ridge v. Baltimore Gas & Electric Co.*, 120 Md. App. 444, 465 (1998). When reviewing findings of law, however, no such deference is given the agency's conclusion beyond weight merited by the presumptive force of the reasoning employed. *Columbia Road Citizens Assoc. v. Montgomery County,* 98 Md. App. 695 (1994).[4]

Pursuant to Maryland Rule 7-209, the Court may affirm, reverse, or modify the agency's order or action, and/or may remand the action to the agency for further proceedings.

DISCUSSION

A nonconforming use exists if a person utilizes property in a certain manner that is lawful before and up to the time of the adoption of a zoning ordinance, though the then-adopted zoning ordinance may make that previous lawful use non-permitted. *Purich v. Draper Properties, Inc. 395 Md. 694, 708 (2006)* (citations omitted). The rationale for

[3] This question is as presented by Hammond.
[4] For a lengthier discussion of this standard, which is the same for this Court as the appellate court, see pages 28-31 of the 2005 COSA opinion.

nonconforming uses is that the adoption of the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Nonconforming use is a vested right and entitled to constitutional protection. *Purich, supra* citing *Amereihn v. Kotras,* 194 Md. 591, 601 (1950).

The earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned. To that end, zoning law forbids or limits the expansion of nonconforming uses through economic attrition and physical obsolescence. *Purich, supra* citing *County Council of Prince George's County v. E.L. Gardner, Inc., 293 Md. 259, 266 (1982).)*

Generally speaking, zoning law does not permit a nonconforming use to be expanded; intensification of a nonconforming use is permitted. Expansion and intensification are closely related. The word "intense" has been defined as possessing or displaying a distinctive feature to an extreme degree, or extreme in degree, or extreme in degree, strength or size. The word "expand" can be defined as to increase the size, volume, quantity or scope of, to enlarge.

Equitable estoppel is the effect of the voluntary conduct of a party whereby the party is precluded from asserting rights which might have existed as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right. *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239, 247 (1986). Equitable estoppel operates to prevent a party from asserting his rights under a general technical

rule of law, when that party has so conducted himself that it would be contrary to equity and good conscience to allow him to do so. *Id.*

In *Permanent Financial*, cited by the parties in the instant case, pursuant to the authority of a building permit issued by Montgomery County, a developer undertook construction of an office building. Eight and one half months and more than two million dollars later, when the shell of the building was complete, the County suspended the building permit and issued a stop work order on the grounds that the building violated statutory height limitations, set-back requirements, and floor area ratio restrictions. The Court of Appeals concluded that the County was equitably estopped from contending that the building violated the height limitations of the Montgomery County Code.

Permanent began development of the building by obtaining a building permit from the Montgomery County Department of Environmental Protection. The record before the Montgomery County Board of Appeals disclosed that the interpretation urged by Permanent regarding the Montgomery County Code height limitations had been consistently applied by the County for buildings in these circumstances. The record further disclosed, however, that the Montgomery County Planning Board held quite a different view. The Montgomery County Board of Appeals concluded that the definition urged by the Planning Board was correct and that the building was too high.

Permanent clearly relied upon the interpretation the County had previously given to the height limitation in its design and construction of the building. Because Permanent had spent substantial funds due to its reliance upon the permit, the Court of Appeals concluded it would be inequitable for the County to require removal of the building's fourth floor.

Unlike the situation in *Permanent Financial*, the present case does not involve the ambiguity *vel non* of a county ordinance which was subject to two reasonable interpretations. *See also Marzullo v. Kahl*, 336 Md. 158, 194 (2002).

In the 2005 decision, the Court of Special Appeals paused to note, for the Board's benefit, that

> [z]oning estoppel is the theory of equitable estoppel applied in the context of zoning disputes. *Sycamore Realty v. People's Counsel*, 344 Md. 57, 63 (1996). It is used "to achieve equitable results in zoning disputes between the government and its property owners. "*Id.*j. *see County Council v. Offen*, 334 Md. 499, 505 n.4 (1994).

COSA at p. 54. Further, the appellate court continued

> Zoning estoppel "is a legal defense rather than an equitable remedy, and may be adjudicated during administrative proceedings." Relay *Improvement Assoc. v. Sycamore Realty Co., Inc.*, 105 Md. App. 701, 716 (1995), aff'd, 344 Md. 57 (1996). The *Relay* Court explained that the Court of Appeals has "applied the doctrine of equitable estoppel in the context of zoning matters "only on "rare occasions" *Id.* at 723.

COSA at p. 54-55.

The doctrine of equitable estoppel cannot be invoked to defeat the enforcement of ordinances because of an error or mistake created by one of its officers which has been relied on by the third party to his detriment. *Cromwell v. Ward*, 102 Md. App. 691, 725 (1995); *City of Hagerstown v. Long Meadow Shopping Center*, 264 Md. 481 (1972); *Inlet Associates v. Assateague House Condominium Assoc.*, 313 Md. 413 (1988).

Hammond argues that the County Board of Appeals in this case failed to make findings as to three elements needed for an equitable estoppel claim:

1) a voluntary representation of one party
2) that is relied on by the other party
3) to the other party's detriment

Consequently, Hammond seeks remand to the County Board of Appeals. It is Hammond's contention that he relied upon the April 20, 2001 letter from DPDM described above, the so-called Moxley letter, in purchasing the property which is the subject of this proceeding. Although the County Board of Appeals did not expressly make findings of fact in the remand proceeding, there does not appear to be any dispute regarding the material facts relative to the equitable estoppel claim. Moreover, the previous Findings of Fact concerning this subject property in Case No. 03-366-SPH (Exhibit C to Hammond's Memorandum) are sufficient. This Court believes the record is clear as to the Moxley letter and Hammond's reliance thereon in purchasing the property. Further, the record is clear that Hammond believes the "detriment" he has suffered is the expenditures and work involved in his unlawful expansion of the lawn mower sales and service operation. The facts concerning Hammond's expenditures and work on the property are undisputed.

Hammond sought, by way of a special hearing request, for permission to operate a small engine repair facility on the subject site. Exhibit C to Hammond's Memorandum is Deputy Zoning Commissioner's Findings of Fact and Conclusions of Law in Case No. 03-366-SPH. Hammond testified he wants to repair "small engines such as found on lawn mowers, riding tractors, chainsaws, and other similarly sized gasoline engines." He also wants to service equipment other than that which may be purchased on site. Commissioner Haines previously restricted service to lawn mowers for products sold on site. Consistent with that decision Deputy Commissioner Kotroco denied Hammond's request to expand use of the property to include a small engine repair facility for mowers or engines not purchased on site. Both decisions, along with the Moxley letter, appear

consistent with use of the property as a "country store".

Issuance of the Moxley letter and Hammond's reliance on the Moxley letter in purchasing the subject property do not estop enforcement of the County zoning law in this case. Nowhere does the Moxley letter suggest that Hammond can operate a small engine repair service facility on the subject property. The Moxley letter correctly references the non-conforming use, that is, a country store, which is permitted on the subject property. Further, the Moxley letter references the way that the non-conforming use has been interpreted, that is, the country store which included lawn mower sales and service among other sales and services of food, household hardware, plants, trees, lawn and garden supplies.

The Moxley letter was incorrect in that it suggested that the "lawn mower sales and service" was an approved non-conforming use itself. As the parties to the instant case are aware, that incorrect understanding of the non-conforming use was a part of prior decisions of the County Board of Appeals and this Court until the 2005 COSA Opinion. That incorrect understanding, however, does not preclude the enforcement of the zoning law as to Hammond. Hammond is still permitted to conduct a lawn mower sales and service operation on the subject property as a part of the non-conforming use (a country store). The fact that he repaired the electric and plumbing systems in the property's buildings, installed a roll down door and hauled away 30-40 truck loads of debris would not change the outcome. No zoning employee ever told Hammond that he could use large commercial vehicles such as the forklift, the front-end loader and a large trailer for hauling 5 or 6 mowers. No zoning employee advised Hammond that he could store or repair a commercial grade wood chipper or commercial tree trimming truck on

the property. In the *Permanent Financial* case, on which Hammond relies, the developer was issued a building permit. There was no such permit, or permission, or encouragement by any zoning official or employee in this matter for Hammond's expansion of the lawn mower sales and service operation such as would merit the relief sought by Hammond.

The same principle is true of Hammond's vested rights argument. Hammond purchased the property with an approved nonconforming use relative to its zoning. Nothing in this proceeding has deprived Hammond of this vested right. In this proceeding, there is no evidence from which one could conclude that Hammond's property rights have been adversely affected. The doctrine of vested rights is related to equitable estoppel and is "derived from principles of common and constitutional law...." *Sycamore Realty Co., Inc. v. People's Counsel of Baltimore County, 344* Md. 57, 67 (1996). Citing this principle from the COSA opinion, the County Board of Appeals found no factual or legal basis for Hammond's vested rights argument on this record. This Court also finds nothing incorrect in the CBA's decision in this regard.

Moreover, no vested rights accrue during the pendency of Special Hearing litigation. *Antwerpen v. Baltimore County*, 163 Md. App. 194, 209 (2005). As a general rule, vested rights do not come into being until the completion of litigation involving the zoning ordinance from which the vested right is claimed to have originated. *Antwerpen* 163 Md. App. at 210. A vested rights claim seeks protection for a legal use affected by an adverse change in the zoning law. No such change occurred here.

Hammond's Petition for Special Hearing requested a determination that his use of the subject property was within the scope of the non-conforming use recognized in

Zoning Commissioner Haines' 1988 decision. No vested rights could have accrued during the pendency of this litigation.

In its October 2, 2009 Opinion, the County Board of Appeals stated that "the law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the County official, zoning estoppel does not apply." The County Board of Appeals Opinion 03-366-SPH (2009). On the page of the Court of Special Appeals opinion cited by the County Board of Appeals, the appellate court summarized the argument of one of the parties to this case. That party's argument was that "the law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the County official, zoning estoppel does not apply." This was not the opinion of the Court of Special Appeals, but instead a summary of the argument of a party to the case; and, the party's argument was legally incorrect. "Equitable estoppel" as is stated above – the effect of the voluntary conduct of a party whereby the party is precluded from asserting rights which might have existed as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right.

This Court reviews an agency's conclusions of law *de novo* for correctness. *Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115 (2008). "The [C]ourt frequently gives weight to an agency's experience in interpretation of a statute that it administers, but it is always within the [C]ourt's prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong." *Id.* In this case the Opinion of the County Board of Appeals was legally incorrect.

Although this Court believes that the Board of Appeals reached the right result, it cannot affirm when the result was reached in a legally incorrect way. *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108 (2001); *United Steelworkers v. Bethlehem Steel Corp.*, 298 Md. 665 (1984).

On remand the County Board of Appeals should apply the correct test for equitable estoppel.

CONCLUSION

For the reasons stated herein, the case is **AFFIRMED in part and REMANDED in part** to the County Board of Appeals for further proceedings consistent with this opinion.

5/21/10 Susan Souder
JUDGE SUSAN SOUDER

Copies sent to:

John C. Murphy, Esq.
516 N. Charles Street
Suite 206
Baltimore, MD 21201

Baltimore County Board of Appeals
105 W. Chesapeake Avenue
Towson, MD 21204

Peter M. Zimmerman, Esq.
People's Counsel for Baltimore County
105 W. Chesapeake Avenue
Room 204
Towson, MD 21204

Paul Mayhew
Assistant County Attorney
Old Courthouse, 2nd Floor
400 Washington Avenue
Towson, MD 21204

The Honorable Barbara R. Jung
11939 Falls Road
Cockeysville, MD 21030

5/21/10

IN THE MATTER	*	IN THE
OF JAMES G. HAMMOND	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	CASE NO: 03-C-09-13065

* * * * * * * * * * * *

ORDER

Having considered the record herein, the parties' memoranda and oral argument presented on April 2, 2010, and for the reasons stated in the Memorandum Opinion issued this same date, it is this 21st day of May, 2010

ORDERED, the Opinion of the Board of Appeals of Baltimore County dated October 2, 2009 is affirmed regarding Hammond's vested rights argument, and it is further

ORDERED, the case is reversed and remanded as to Hammond's estoppel claim.

Susan Souder
JUDGE SUSAN SOUDER

Copies sent to:

John C. Murphy, Esq.
516 N. Charles Street
Suite 206
Baltimore, MD 21201

Baltimore County Board of Appeals
105 W. Chesapeake Avenue
Towson, MD 21204

cc: J Murphy
K Dennis
P Mayhew

FILED MAY 25 2010

DATE	COURT MINUTES
7/2/10	Hon. SS - HH / 078F

Reorder from:
Hurley Business Systems
410-255-3433 410-255-3558 Fax

Case #:	Folder #:	Date Filed:
03-C-09-013065	01	10/28/2009

Case Type:
Administrative Agency Appeal

In The Matter Of James G Hammond

Petitioner: James G Hammond

Petitioner's Attorney:	Phone No.:	Fax No.:
John C Murphy	(410)625-4828	

C09013065V01

CIRCUIT COURT
FOR
BALTIMORE COUNTY

CIVIL / FAMILY

SPECIALLY ASSIGNED TO JUDGE SOUDER

C09 13065
CASE NUMBER

VOLUME ____

1 pl ___ to ___
2 pl ___ to ___
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12 pl ___ to ___
13 pl ___ to ___
14 pl ___ to ___
15 pl ___ to ___

ADDITIONAL RECORDS ON MICROFILM YES ☐

3/1/10

MEMORANDUM OF BARBARA JUNG, PRO SE 11939 Falls Road Cockeysville, Md. 21030	*	IN THE
		CIRCUIT COURT
PETITION FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	FOR
The Jefferson Building, 105 W. Chesapeake Avenue Suite 203 Towson, Md.21204	*	BALTIMORE
IN THE MATTER OF THE APPLICATION **OF JAMES G. HAMMOND** FOR A SPECIAL HEARING for property located on the w/s of Falls Rd.2,200' N of Broadway Rd. 8th Election District, 3rd Councilmanic District	*	COUNTY
	*	CASE NO.
	*	03-C-09-013065
Case No. 03-366SPH before the County Board of Appeals of Baltimore County		

* * * * * * * * *

MEMORANDUM OF APPEAL OF BARBARA JUNG, PRO SE

ISSUE

The only issue before the Court is whether the Board of Appeals was correct in it's denial of Mr. Hammond's claim of estoppel or vested rights.

FACTUAL SUMMARY

The factual background has been sufficiently covered by Mr. Hammond's and The People's Counsel Memoranda.

ARGUMENT

Mr. Hammond's first argument is that the Board of Appeals decision should be reversed because the Board made no findings of fact upon which their decision is based.

The logical place to start is a determination of who has the burden of production of facts that would support an estoppel or vested rights claim. The Court of Appeals in **Reichs Ford Road Joint Venture v. State Roads Commission of The State Highway Administration, Maryland Department of Transportation 388 Md. 500 (2005)** held that " the party attempting to prove estoppel bears the burden of adducing facts that support it's contention". Therefore, if this Court finds that there is insufficient evidence on which an estoppel or vested rights claim can rest, that deficiency was caused by Mr. Hammond's failure to produce those facts and his claim should fail.

However, the Board did make findings of fact. They found that Mr. Hammond relied on a letter from Mr. Moxley that he (Mr. Hammond) could use the property for the sale and service of lawn mowers, that there was no validly issued permit in this case and that there was no change in the zoning classification of the property. Those facts are a sufficient basis upon which to base their decision on estoppel and vested rights.

Mr. Hammond then argues that the Board misapplied the Doctrine of Zoning Estoppel. The Board made two findings. The first is that equitable estoppel does not apply and the second that vested rights does not apply. The Board cited and clearly followed Judge Hollander's direction as to these two distinct yet related legal doctrines. The Board made no findings of zoning estoppel therefore they could not misapply the law.

The Board found that a claim of vested rights was not supported by the evidence because Mr. Hammond relied on the advice of Mr. Moxley as opposed to a validly issued permit and that in addition there was no change in the zoning classification of the property. This is a correct statement of the law of vested

rights in Maryland. The Board had the advantage of Judge Hollander's clear recitation of what constitutes a vested right in Maryland. On page 55 of her Opinion in **James G. Hammond v. Barbara R. Jung,** filed November 15, 2005, Judge Hollander held that vested rights "provides that a landowner may rely on nothing other then a properly issued permit and that a substantial changes in circumstances will not be found unless the landowner begins actual, above ground construction". **Relay Impovement Assoc. v. Sycamore Realty Co. Inc. 105 Md. Ap 701 (1995), Marzulo v. Kahl, 366 Md. 158 (2001), Prince Georges County v. Sunrise Development Ltd, Partnership, 330 Md. 297 (1993), Permanent Financial Corp. v. Montgomery County, 308 Md 239, (1986), etc.**

The Board was clearly correct in this assertion. The law of Vested Rights does not apply in this case.

Mr. Hammond then argues that he is entitled to relief under Estoppel principals. Because of the state of the law in Maryland on estoppel, this claim must also fail.

The general rule of estoppel when applied to zoning cases in Maryland is that "the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances because of an error or mistake committed by one of it's officers or agents which has been relied on by a third party to his detriment". **Lipsitz v. Parr 164 Md. 222 (1933).** The Court of Appeals has not allowed the defense of estoppel when County officials made a mistake by advising a developer that the County could convey a right of way by an ordnance as opposed to a resolution. **Inlet Associates v. Assateague House Condominium Assocaiates 313 Md. 413 (1988).** The Court of Appeals refused to allow the defense of estoppel in a situation where a County official advised a developer that he need not apply for a building permit for his project. The advice was in writing and relied on by the developer to begin construction. **The City of Hagerstown et al v. Long Meadow Shopping Center et al 264 Md. 481 (1972).**

Mr. Hammond relies on the holding of **Permanent Financial Corp. v. Montgomery County 308 Md. 239 (1986)** to support his argument. The holding of Permanent Financial is very narrow in scope and in no way overrules the long line of cases in Maryland on estoppel. As Mr. Zimmerman, the Peoples Counsel argues, Permanent Fin is "the rare occasion where the Court has opened a very

narrow window".

In **Permanent Fin**, the Court of Appeals allowed the defense of estoppel in a situation where the County issued a permit for a building that was subsequently found to violate the County's height restriction. The decision to issue the permit was based on an interpretation of the height restriction statute and was consistent with the County's practice in similar cases. In addition, the County waited eight and a half months, after Permanent Fin had spent more then $2,000,000 to complete the building before they issued the stop work order. The issue was whether the height of the building, which was 43 feet, was permissable under the statute. The Court found that the County had consistently allowed buildings to exceed the 43 foot height restriction based on the definition of "habitable space". The Court allowed Permanent Fin to assert the estoppel defense not because the issuance of the permit was a mistake but because it was consistent with the County's practice of interpreting the "habitable space" definition.

The facts in the present case are not amenable to the Permanent Fin facts. In this case, Mr. Moxely, on behalf of the County, responded to Mr. Hammond's letter requesting a clarification of the permissable use of the property. Mr. Moxley simply replied that the use of the property was " as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in case number 89-204 SPH". That information was true. It was not based on two different interpretations of the law as it was in Permanent Fin. It may have been incomplete in that it did not endeavor to explain the convoluted law of non conforming uses. But it was clearly not based on differing interpretations as in Permanent Fin.

The present case is factually similar to the facts in **United Parcel Service, Inc. v. Peoples Counsel for Baltimore County 93 Md. Ap. 59(1992)** reversed on procedural grounds **United Parcel Service Inc. and Baltimore County v. Peoples Counsel for Baltimore County 336 Md. 569(1994).** In that case, UPS relied on the advice of the then Zoning Commissioner, Arnold Jablon, as to the permitted use of the property they were purchasing. Relying on that advice, they purchased the property and began construction. When a neighbor objected, the Board of Appeals found that Mr. Jablon's advice was wrong and that Baltimore County was not estopped from enforcing the correct interpretation of the permitted use.

The Board of Appeals correctly concluded that the defenses of estoppel and vested rights do not apply in this case. There were sufficient facts in the record o this seven year legal ordeal on which to base that conclusion. They correctly

interpreted the law, aided no doubt by Judge Hollander's Court of Special Appeals Opinion in this case. For these reasons, the Board of Appeals decision dated October 2, 2009 should be affirmed.

BARBARA R. JUNG, PRO SE
11939 Falls Road
Cockeysville, Md. 21030

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THIS 1 OF March, 2010, a copy of the foregoing Memorandum was mailed first class, postage prepaid to Peter Max Zimmerman, Esq., Old Courthouse, Room 47, 400 Washington Avenue, Towson, Md. 21204, John C. Murphy, Esq., 516 N. Charles Street, Suite 206, Baltimore, Md. 21201, Paul Mayhew, Esq., Assistant County Attorney, Office of Law, 400 Washington Avenue, Towson, Md. 21204 and The Board of Appeals for Baltimore County, The Jefferson Building, 105 W. Chesapeake Avenue, Suite 203, Towson, Md. 21204.

BARBARA JUNG
11939 FALLS ROAD
COCKEYSVILLE, MARYLAND 21030

March 1, 2010

Re: Case No. 03-C-013065

Clerk of The Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204

Dear Madame:

Please accept for filing the enclosed Memorandum of Appeal in the above named case. Thank you for your cooperation in this matter.

Sincerely,

/Barbara R. Jung

Barbara R. Jung, Pro Se

CC: Peter Max Zimmerman, Esq.
John C. Murphy, Esq.
Paul Mayhew, Esq.

RECEIVED
MAR - 2 2010
BALTIMORE COUNTY
BOARD OF APPEALS

BARBARA JUNG
11939 FALLS ROAD
COCKEYSVILLE, MARYLAND 21030

Re: Case No. 03-C-09-013065

March 1, 2010

The Honorable Susan Souder
The Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, Md. 21204

Dear Judge Souder:

On March 1, 2010, I filed with the Circuit Court for Baltimore County my Memorandum of Appeal in the above named case. Enclosed is a copy for your file.

Sincerely,

Barbara Jung

CC: Peter Max Zimmerman, Esq.
John C. Murphy, Esq.
Paul Mayhew, Esq.

12/10/09

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
JAMES HAMMOND *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE COUNTY BOARD OF APPEALS NO. : 03-C-09-013065
OF BALTIMORE COUNTY *
JEFFERSON BUILDING – ROOM 203
105 W. CHESAPEAKE AVENUE *
TOWSON, MARYLAND 21204

*

IN THE MATTER OF :
JAMES HAMMOND – LEGAL OWNER *
FOR SPECIAL HEARING ON PROPERTY
LOCATED ON THE W/S OF FALLS ROAD *
2,200' N OF BROADWAY ROAD
(11942 AND 11950 FALLS ROAD *

8TH ELECTION DISTRICT *
3RD COUNCILMANIC DISTRICT

*

BOARD OF APPEALS CASE NO.: 03-366-SPH

*

* * * * * * * * * * * *

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 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 OF APPEALS AND DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT OF BALTIMORE COUNTY

RECEIVED AND FILED
2009 DEC 10 PM 1:22
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

Case No.: 03-366-SPH

February 10, 2003	Petition for Special Hearing to approve the clarification that a lawn and garden equipment sales and service business are allowed with service not being limited to products sold on site and to amend the prior orders in Case numbers 89-204-SPH and 94-014-SPH if necessary.
February 28, 2003	Entry of Appearance of Office of People's Counsel
March 4, 2003	Certificate of Posting
March 6, 2003	Certificate of Publication
March 14, 2003	ZAC Comments
April 11, 2003	Findings of Fact and Conclusion issued by Deputy Zoning Commissioner issued DENYING Petitioner's request for Special Hearing and Ordering that all other terms and approvals contained in the decision in Case No.: 89-204-SPH remain in full force and effect and shall not be affected by this decision.
April 17, 2003	Notice of Appeal filed by John C. Murphy, Esquire on behalf of Petitioner, James G. Hammond.
May 15, 2003	Certificate of Posting.
June 11, 2003	Letter from Office of People's Counsel.
June 25, 2003	Board convened for hearing.

Exhibits submitted at hearing (three days) before the Board of Appeals:

Petitioner's Exhibit No.

1 – Murphy's trial Memorandum. (FOR ID PURPOSES ONLY)
2 – Petition for NCU granted 1988
3 – Letter from Zoning Commissioner Haines in 1988
4 – Decision/Order in Case No.: 89-204-SPH
5 – Letter (undated) James Hammond to Arnold Jablon, Esquire
6 – Letter dated 4/20/01 from Shokley to Hammond
7 – Photographs a-i
7a – Front of rear building
7b – Building with view from Falls Road facing west.
7c – View looking north
7d – From hillside and driveway
7e – Driveway over small stream
7f – Front of store

7g – New trees to screen
7h – Vehicles and tractor in lot in snow
7i – Front of rear building facing north
8 – Plat of subject property
9 – Draft – Proposed Restrictions to be imposed by Board of Appeals for Baltimore County
10 – Sign in sheets in support of Petitioner from hearing before the Deputy Zoning Commissioner
11 – Letter from Falls Road Community Association, Inc. ("FRCA")
12 – Letter from Mills dated 3/18/03
13 – Letter from Sprecher

Protestants' Exhibit No.

1 – Rule 8 papers from Falls Road Community Association, Inc. ("FRCA")

July 28, 2003	Respondent Barbara Jung's Memorandum filed by Barbara Jung, pro se.
July 28, 2003	Petitioner's Hearing Memorandum filed by John C. Murphy, Esquire on behalf of Petitioner, James G. Hammond.
August 26, 2003	Board of Appeals convened for public deliberation.
October 17, 2003	Opinion and Order issued by the Board of Appeals for Baltimore County Denying Petitioner's request for Special Hearing.
October 21, 2003	Motion for Rehearing filed by John C. Murphy, Esquire on behalf of Petitioner, James G. Hammond.
October 21, 2003	Supplementary Motion for Rehearing filed by John C. Murphy, Esquire on behalf of Petitioner, James G. Hammond.
October 30, 2003	Respondent Barbara Jung's Response to Request for Rehearing filed by Barbara Jung, pro se.
Undated	Reply Memorandum filed by John C. Murphy, Esquire on behalf of Petitioner, James G. Hammond.
November 5, 2003	Board convened for hearing, Counsel presented Argument Only, on Petitioner's Motion for Rehearing.

November 6, 2003	Ruling on Petitioner's Motion for Rehearing issued by Board AFFIRMING the original decision of the Board of Appeals dated October 17, 2003.
November 12, 2003	Petition for Judicial Review filed by John C. Murphy, Esquire on behalf of Petitioner, James G. Hammond.
November 17, 2003	Copy of Petition for Judicial Review received from Circuit Court for Baltimore County. Civil Action No.: 03-C-03-012458.
November 17, 2003	Amendment to Petition for Judicial Review filed in the Circuit Court for Baltimore County.
November 19, 2003	Certificate of Notice filed in the Circuit Court for Baltimore County and sent to all parties and interested persons.
December 3, 2003	Response to Petition for Judicial Review filed in the Circuit Court for Baltimore County by Barbara R. Jung, Protestant, pro se.
January 8, 2004	Transcript of Proceedings filed.
January 8, 2004	Record of Proceedings filed with the Circuit Court for Baltimore County in Civil Action No.: 03-C-03-012458.
July 8, 2004	Opinion and Order of Circuit Court for Baltimore County Affirming the Board of Appeals decision dated October 17, 2003.
November 15, 2005	Unreported Opinion of the Court of Special Appeals of Maryland issued Vacating the decision of the Circuit Court for Baltimore County dated July 8, 2004, and Remanding this matter to the Circuit Court for Baltimore County with directions to Remand this matter back to the Board of Appeals for further proceedings consistent with this Opinion.
January 31, 2006	Order of The Honorable John O. Hennegan of the Circuit Court for Baltimore County *REMANDING* this matter back to the Board of Appeals for further proceedings consistent with Judge Hollander's November 15, 2005 Unreported Opinion.
February 27, 2006	Letter from Mr. Murphy via fax with accompanying agreement between the parties and a proposed Order; stipulation to be presented to the Board at the hearing on February 28, 2006, along with the original proposed Order.
February 28, 2006	Board of Appeal convened for hearing, Counsel presented Argument Only on Remand from the Circuit Court for Baltimore County. No Exhibits were accepted. Proposed Order and Stipulation presented to the Board.

March 29, 2006	Memorandum filed by John C. Murphy, Esq., on behalf of James G. Hammond, Petitioner.
March 29, 2006	People's Counsel's Second Remand Memorandum, Post-Hearing, filed by the Office of People's Counsel.
March 29, 2006	Respondent's Memorandum filed by Barbara R. Jung, *pro se*.
May 2, 2006	Board of Appeals convened for Public Deliberation on Remand from the Circuit Court for Baltimore County.
September 28, 2006	Board issued its Order of Remand by Order of the Circuit Court for Baltimore County Pursuant to Order of the Maryland Court of Special Appeals, along with a Dissenting Opinion and Order on Remand. Majority Opinion Ordered that Petitioner/Appellant's request for Special Hearing in Case No.: 03-366-SPH, be and is hereby Granted with restrictions. Dissenting Opinion on Remand as she did not agree with the imposition of the restrictions, as she believed that this matter was more in keeping with a special exception.
October 23, 2006	Petition for Judicial Review filed in the Circuit Court for Baltimore County by John C. Murphy, Esquire on behalf of Petitioner/Appellant, James G. Hammond.
October 25, 2006	Copy of Petition for Judicial Review received from Circuit Court. Civil Action No.: 03-C-06-011166.
November 6, 2006	Certificate of Mailing filed with the Circuit Court, and mailed to all interested parties, in response to John C. Murphy, Esq.'s appeal on behalf of James G. Hammond.
November 6, 2006	Response to Petition for Judicial Review by People's Counsel.
November 6, 2006	Cross-Petition for Judicial Review filed by People's Counsel.
November 16, 2006	Second Certificate of Notice filed with the Circuit Court, and sent to all interested parties, in response to the request for Petition for Judicial Review filed by People's Counsel.
December 6, 2006	Transcript of Proceedings filed.
December 7, 2006	Record of Proceedings filed in the Circuit Court for Baltimore County, Maryland in Civil Action No.: 03-C-06-011166.

March 22, 2007	Opinion and Order issued by the Circuit Court for Baltimore County. Ordered decision of the Board of Appeals for Baltimore County dated September 28, 2006 is Reversed and this matter is Remanded to the Board of Appeals for Baltimore County for further proceedings consistent with the Opinion of the Court of Special Appeals, No. 00980, September Term 2004, filed November 15, 2005 concerning Mr. Hammond's estoppel and vested rights claims.
April 29, 2009	Notice of Deliberation sent to all parties and interested persons. Public Deliberation scheduled for June 1, 2009.
June 1, 2009	Letter from Office of People's Counsel for Baltimore County reviewing the history of this matter for the Board.
June 2, 2009	Letter from John C. Murphy, Esquire on behalf of James G. Hammond, Petitioner/Appellant, requesting an evidentiary hearing.
June 5, 2009	Letter from Barbara Jung, Protestant Pro se, in response to Mr. Murphy's request for an evidentiary hearing.
June 11, 2009	Board of Appeals convened for public deliberation on second Remand from the Circuit Court for Baltimore County.
October 2, 2009	Opinion and Order issued by the Board of Appeals for Baltimore County Denying Petitioner/Appellant's request to continue operations based upon the doctrine of equitable estoppel and/or Petitioner/Appellant's vested rights claims.
October 28, 2009	Petition for Judicial Review filed in the Circuit Court for Baltimore County by John C. Murphy, Esquire on behalf of Petitioner/Appellant, James G. Hammond.
November 2, 2009	Copy of Petition for Judicial Review received from Circuit Court. Civil Action No.: 03-C-09-013065.
November 4, 2009	Response to Petition for Judicial Review filed by Barbara R. Jung, Protestant Pro se.
November 5, 2009	Certificate of Compliance filed in the Circuit Court for Baltimore County and sent to all parties and interested persons.
December 10, 2009	Record of Proceedings filed in the Circuit Court for Baltimore County, in Civil Action No.: 03-C-09-013065

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board.

Sunny Cannington

Sunny Cannington, Legal Secretary
County Board of Appeals
The Jefferson Building, Suite 203
105 W. Chesapeake Ave.
Towson, Maryland 21204
410-887-3180

c: John C. Murphy, Esquire
James G. Hammond
Barbara R. Jung
Kim Detrick
Ken Sadofsky
Office of People's Counsel
William J. Wiseman, III, Zoning Commissioner
Arnold F. "Pat" Keller, Director/Office of Planning
Timothy Kotroco, Director/Office of Permits and Development Mgmt
John E. Beverungen, County Attorney

11/5/09

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY
*
PETITION OF:
JAMES HAMMOND *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE COUNTY BOARD OF APPEALS NO. : 03-C-09-013065
OF BALTIMORE COUNTY *
JEFFERSON BUILDING – ROOM 203
105 W. CHESAPEAKE AVENUE *
TOWSON, MARYLAND 21204
*
IN THE MATTER OF :
JAMES HAMMOND – LEGAL OWNER *
FOR SPECIAL HEARING ON PROPERTY
LOCATED ON THE W/S OF FALLS ROAD *
2,200' N OF BROADWAY ROAD
(11942 AND 11950 FALLS ROAD *

8TH ELECTION DISTRICT *
3RD COUNCILMANIC DISTRICT
*
BOARD OF APPEALS CASE NO.: 03-366-SPH
*

RECEIVED AND FILED
2009 NOV -5 AM 8:46
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

* * * * * * * * * * * *

CERTIFICATE OF COMPLIANCE

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:

John C. Murphy, Esquire
516 N. Charles Street, Suite 206
Baltimore, MD 21201

Barbara Jung
11939 Falls Road
Cockeysville, MD 21030

James G. Hammond
1517 Applecroft Lane
Cockeysville, MD 21030

Kim Detrick
11941 Falls Road
Cockeysville, MD 21030

Ken Sadofsky
11944 Falls Road
Cockeysville, MD 21030

Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

William J. Wiseman, III, Zoning Commissioner
The Jefferson Building, Suite 103
105 W. Chesapeake Avenue
Towson, MD 21204

Arnold F. "Pat" Keller, Director
Office of Planning
The Jefferson Building, Suite 101
105 W. Chesapeake Avenue
Towson, MD 21204

Timothy Kotroco, Director
Office of Permits and Development Mgmt
County Office Building
111 W. Chesapeake Avenue, Suite 105
Towson, MD 21204

John E. Beverungen, County Attorney
Office of Law
400 Washington Avenue
Towson, MD 21204

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

I HEREBY CERTIFY that on this 5th day of November 2009, a copy of the foregoing Certificate of Compliance has been mailed to the individuals listed above.

Sunny Cannington

Sunny Cannington, Legal Secretary
County Board of Appeals
The Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, Maryland 21204
410-887-3180

County Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

November 5, 2009

John C. Murphy, Esquire
516 N. Charles Street, Suite 206
Baltimore, MD 21201

Barbara Jung
11939 Falls Road
Cockeysville, MD 21030

Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

RE: Petition for Judicial Review
Circuit Court Case No.: 03-C-09-013065
In the Matter of: James G. Hammond
Board of Appeals Case No.: 03-366-SPH

Dear Counsel:

Notice is hereby given, in accordance with the Maryland Rules that a Petition for Judicial Review was filed on October 28, 2009 by John C. Murphy, Esquire on behalf of James G. Hammond 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 with the Circuit Court for Baltimore County within 30 days after the date of this letter, pursuant to the Maryland Rules.

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 filed by John C. Murphy, Esquire within 60 days.

A copy of the Certificate of Compliance has been enclosed for your convenience.

Very truly yours,

Sunny Cannington

Sunny Cannington
Legal Secretary

Enclosure

cc: James G. Hammond
William J. Wiseman, III, Zoning Commissioner
John E. Beverungen, County Attorney
Timothy Kotroco, Director/Permits & Development Mgmt
Kim Detrick
Arnold F. "Pat" Keller, Director/Office of Planning
Ken Sadofsky

11/3/09

RECEIVED
NOV - 4 2009
BALTIMORE COUNTY
BOARD OF APPEALS

RESPONSE OF BARBARA JUNG * **IN THE**
11939 FALLS ROAD
COCKEYSVILLE, MD. 21030

CIRCUIT COURT

FOR JUDICIAL REVIEW OF THE *
DECISION OF THE COUNTY BOARD
OF APPEALS OF BALTIMORE COUNTY
The Jefferson Building, 105 W. Chesapeake Avenue, FOR
Suite 203, Towson, Md. 21204

IN THE MATTER OF THE APPLICATION *
OF **JAMES G. HAMMOND** FOR
A SPECIAL HEARING for the property located on the BALTIMORE COUNTY
W/S of Falls Road, 2,200 N of Broadway Road
(11942 & 11950 Falls Road)
8th Election District, 3rd Councilmanic District *

Case No. 03-366SPH before the County Board Civil No. 03-C-09-013065
of Appeals of Baltimore County

* * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

Barbara Jung, Pro Se, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed by James G. Hammond, and states that I intend to participate in this action for Judicial Review. The undersigned participated in the proceedings before the County Board of Appeals.

/Barbara R Jung

BARBARA R. JUNG
11939 FALLS ROAD
COCKEYSVILLE, MD. 21030
410-561-3182

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of November, 2009, a copy of the foregoing Response to Petition for Judicial Review was mailed to Peter Max Zimmerman, Esq., Peoples Counsel for Baltimore County, The Jefferson Building, 105 W. Chesapeake Avenue, Room 204, Towson, Md. 21204 and John C. Murphy, Esq., 516 N. Charles Street, Suite 206, Baltimore, Md. 21201, Attorney for the Petitioner.

Barbara R. Jung, Esq.

10/28/09

PETITION OF JAMES HAMMOND
FOR REVIEW OF DECISION OF THE
BOARD OF APPEALS
105 W. CHESAPEAKE AVENUE
TOWSON, MD. 21204
IN THE CASE OF THE MATTER
OF JAMES G. HAMMOND,
CASE NO. 03-366-SPH

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY
ON REMAND IN
CIVIL ACTION NO. C-03-12458

C-09-13065

PETITION FOR JUDICIAL REVIEW

James G. Hammond, Petitioner, by John C. Murphy, requests judicial review of the decision of the Baltimore County Board of Appeals in Case No. 03-366-SPH, decided October 2, 2009.

John C. Murphy

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

RECEIVED AND FILED
2009 OCT 28 AM 11:54
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

CERTIFICATE OF MAILING

I hereby certify that I ~~mailed~~ delivered a copy of the foregoing petition to the Board of Appeals, 105 West Chesapeake Avenue, Towson, Md. 21204, this 28 day of October, 2009.

John C. Murphy

RECEIVED
NOV - 2 2009
BALTIMORE COUNTY
BOARD OF APPEALS

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

Case Number: 03-C-09-013065

TO: BALTIMORE COUNTY BOARD OF APPEALS
105 W Chesapeake Avenue
Towson, MD 21204

PETITION OF JAMES HAMMOND
FOR REVIEW OF DECISION OF THE
BOARD OF APPEALS
105 W. CHESAPEAKE AVENUE
TOWSON, MD. 21204
IN THE CASE OF THE MATTER
OF JAMES G. HAMMOND,
CASE NO. 03-366-SPH

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY
ON REMAND IN
CIVIL ACTION NO. C-03-12458

PETITION FOR JUDICIAL REVIEW

James G. Hammond, Petitioner, by John C. Murphy, requests judicial review of the decision of the Baltimore County Board of Appeals in Case No. 03-366-SPH, decided October 2, 2009.

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

CERTIFICATE OF MAILING

I hereby certify that I ~~mailed~~ delivered a copy of the foregoing petition to the Board of Appeals, 105 West Chesapeake Avenue, Towson, Md. 21204, this 28 day of October, 2009.

John C. Murphy

RECEIVED
OCT 28 2009
BALTIMORE COUNTY
BOARD OF APPEALS

10/2/09

IN THE MATTER OF JAMES G. HAMMOND PETITIONER/LEGAL OWNER FOR A SPECIAL HEARING ON THE PROPERTY LOCATED ON THE W/S OF FALLS ROAD 2,200 FEE NORTH OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD)	*	BEFORE THE BOARD OF APPEALS FOR BALTIMORE COUNTY
8th Election District 3rd Councilmanic District	*	Case No.: 03-366-SPH

* * * * * * * * * * *

OPINION

This Board has received the above noted matter on specific remand of the Circuit Court for Baltimore County.

The history of this case extends from its inception in February of 2003. The particular facts and procedural history are already set out in detail, not only in previous opinions of the Circuit Court for Baltimore County (specifically its opinion dated July 7, 2004 and March 21, 2007, the later being that which remands this case to us today) as well as the extensive history provided in the Opinion of Judge Hollander in the Court of Special Appeals decision concerning this matter noted in appeal number 00980 September Term, 2004.

Judge Souder's 2007, most recent opinion, was not appealed and is final. It determined that Petitioner Hammond's use of the property is not a lawful intensification of an approved use. Rather, she found that it was in fact an unlawful extension of the originally approved non-conforming use. The only issues on remand to this Board were whether or not the Appellant had vested rights to operate as he desired as well as whether or not the doctrine of equitable estoppel applied to insulate the Petitioner and his use from applicable zoning. As Judge Souder's Order is final, we shall limit ourselves to a discussion only of the vesting and estoppel issues.

The Board has reviewed the opinion of the Court of Special Appeals in this matter and the insight of that Court with regard to estoppel and vested rights claims.

Petitioner Hammond had relied on a letter from Mr. Moxley, an employee of Baltimore County that he could in fact utilize the property as he desired and as a result the County would be estopped from the changing their mind at this time. The Appellate Court noted with approval language explaining that the "doctrine of equitable estoppel cannot defeat a municipality's enforcement of its own ordinances because of an error of it's agent on which a third may have relied." (Hammond v. Jung, Court of Special Appeals of Maryland, Number 00980, November 15, 2005, 53.) The Court further noted that "the law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the County official, zoning estoppel does not apply." (Id. at 53).

The Board feels that this is not an uncommon situation, nor unreasonable that a County employee could be unintentionally wrong as to advice. We find no evidence to indicate that Mr. Moxley acted in any way that would indicate that he was being arbitrary, capricious or egregious in giving the advice; therefore, the Board does not believe that equitable estoppel is available to save Mr. Hammond's claim.

The related doctrine of vested rights is "derived from principles of common and constitutional law..." *Relay Improvement Association v. Sycamore Realty Company, Inc,* 105 Md. 701, (1995), Aff'd 344 Md. 57, (1996) (Hammond v. Jung, Court of Special Appeals of Maryland, Number 00980, November 15, 2005). It further states: "a landowner may rely on nothing other than a properly issued permit, and that a substantial change in circumstances will not be found unless the landowner begins actual above ground construction." Relay, at 725. (Hammond v. Jung, Court of Special Appeals of Maryland, Number 00980, November 15,

2005). The Court in Hammond, supra, noted with approval that the evidence indicated that Mr. Hammond had relied on the advice of Mr. Moxley as opposed to a validly issued permit and that in any event, there was not a change in the zoning classification of the property. Without these circumstances, vested rights would not apply. This Board has determined that absent those circumstances, and without a valid permit having been issued for construction, the doctrine of vested rights does not apply to the benefit of Mr. Hammond.

DECISION

Accordingly, this Board find unanimously, that neither the doctrine of equitable estoppel nor vested rights apply to the benefit of Mr. Hammond.

ORDER

THEREFORE, IT IS THIS 2nd day of October, 2009 by the County Board of Appeals of Baltimore County

ORDERED Mr. Hammond's request to continue operations as he has, based upon those above noted legal concepts, be and is hereby **DENIED.**

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 M. Stahl, Panel Chairman

Edward W. Crizer, Jr.

Maureen E. Murphy

County Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

October 2, 2009

John C. Murphy, Esquire
516 N. Charles Street, Ste 206
Baltimore, MD 21201

Peter M. Zimmerman, Esquire
Office of People's Counsel
The Jefferson Building, Suite 204
105 W. Chesapeake Avenue
Towson, MD 21204

RE: *In the Matter of: James Hammond-Legal Owner/Petitioner*
Case No.: 03-366-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Theresa Shelton/kc

Theresa R. Shelton
Administrator

TRS/klc
Enclosure

Duplicate Original Cover letter

c: James Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
William J. Wiseman, III, Zoning Commissioner
Timothy Kotroco, Director/PDM
Arnold F. "Pat" Keller, Director/Planning
John E. Beverungen, County Attorney

3/22/07

IN THE MATTER OF:	*	IN THE
JAMES G. HAMMOND	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No.: ~~03-C-03-012458~~ C06-11166

* * * * * * * * * * * * *

MEMORANDUM OPINION

Property owner James G. Hammond, The People's Counsel for Baltimore County and neighboring homeowner Barbara Jung have requested judicial review of the Order of Remand by Order of the Circuit Court for Baltimore County Pursuant To Order of the Maryland Court of Special Appeals by the County Board of Appeals ("Board") dated September 28, 2006, ("2006 Board Order"). For the reasons stated herein, this Court will reverse the decision of the Board and remand this matter for further proceedings.

1. Procedural History

Pertinent procedural history is set forth in the Opinion and Order of this Court dated July 7, 2004 ("2004 CC Opinion") on pages 1-2.[1]

2. Facts

A succinct summary of the Facts, which are mostly not in dispute, is included in this Court's 2004 Opinion on pages 3-4. Although denominated a "Factual Summary" in the Unreported Opinion of the Court of Special Appeals[2]

[1] Under the "Factual Summary" of the appellate court's opinion, procedural history is further detailed.

[2] No. 00980, September Term, 2004, *James G. Hammond v. Barbara R. Jung*, filed November 15, 2005, Opinion by Hollander, J.

FILED MAR 22 2007

("2005 COSA Opinion), pages 1-28, there are lengthy quotes from the parties' papers, lengthy quotes from the records before Deputy Zoning Commissioner Kotroco and the Baltimore County Department of Permits and Development Management, lengthy quotes from the testimony presented to the Board, lengthy quotes from the Board's original 2003 Opinion denying Hammond's Petition for special, lengthy quotes from this Court's 2004 Opinion and lengthy quotes from the parties' appellate briefs. Moreover, the appellate court includes "additional facts" in its discussion. See p. 28.

3. Standard of Review

A final decision of an administrative agency must be upheld on review if it is not premised on an error of law and the factual conclusions are reasonably based on the facts proven. Regarding findings of fact, the reviewing court cannot substitute its judgment for that of the agency and must accept the agency's conclusions if they are based on substantial evidence and if reasoning minds could reach the same conclusion based on the record. *Friends of the Ridge v. Baltimore Gas & Electric Co.*, 120 Md. App. 444, 465 (1998). When reviewing findings of law, however, no such deference is given the agency's conclusion beyond weight merited by the presumptive force of the reasoning employed. *Columbia Road Citizens' Assoc. v. Montgomery County,* 98 Md. App. 695 (1994).[3]

Pursuant to Maryland Rule 7-209, the Court may affirm, reverse, or modify the agency's order or action, and/or may remand the action to the agency

[3] For a lengthier discussion of this standard, which is the same for this Court as the appellate court, see pages 28-31 of the 2005 COSA Opinion.

for further proceedings.

4. Question Presented

Whether the findings in the 2006 Board Order that Hammond's (proposed) lawn mower business is a lawful intensification of the nonconforming use of the property are based on substantial evidence.

5. Discussion

1.

A nonconforming use exists if a person utilizes property in a certain manner that is lawful before and up to the time of the adoption of a zoning ordinance, though the then-adopted zoning ordinance may make that previous lawful use non-permitted. *Purich v. Draper Properties, Inc.*, 395 Md. 694, 708 (2006) (citations omitted). The rationale for nonconforming uses is that the adoption of the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Nonconforming use is a vested right and entitled to constitutional protection. *Purich*, *supra* citing *Amereihn v. Kotras*, 194 Md. 591, 601 (1950).

One of the basic tenets of zoning is that some uses of land are incompatible with others, and that more efficient employment of land resources is achieved if such compatible uses are separated. *Purich*, *supra* citing *County Council of Prince George's County v. E. L. Gardner, Inc.*, 293 Md. 259, 266 (1982). Nonconforming uses pose a formidable threat to the success of zoning since they limit the effectiveness of land use controls, contribute to urban blight,

imperil the success of the community plan, and injure property values. *Id.* at 267 (citations omitted).

The earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned. To that end, zoning law forbids or limits the expansion of noncomforming uses. *Purich, supra* citing *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 307 (1957). The purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *Purich, supra* citing *Gardner, supra*. Local ordinances and regulations must be strictly construed to effectuate the purpose of eliminating nonconforming uses. *Gardner, supra* at 268.

Purich was a dispute involving property on which an automobile filling station ("gas station") was located in a residential neighborhood. The gas station was a lawful nonconforming use. The lessee of the property, the gas station operator, applied for and was granted a special exception to modernize the station. The modernization did not occur. Once a special exception is granted, the nonconforming use ceases.[4] The issue for judicial review was whether the special exception was abandoned; and, if so, whether the nonconforming use "revived."

Though the instant case does not involve a special exception, *Purich* is cited for its recent discussion of undisputed principles applicable here:

a) nonconforming uses are disfavored as are the

[4] The decision in *Purich* is the result of a vote of 4-3. The well-reasoned dissent disagrees with this statement.

expansion of such uses; and

b) this area of the law is very complicated.

The appellate court noted in *Purich* that the Board misconstrued the function of the granting of a special exception and misconstrued when a special exception begins to exist. The Circuit Court in affirming the Board incorrectly interpreted the law as well. At oral argument, counsel noted the many hours already devoted to understanding and arguing the instant dispute which the Court also finds difficult. *Purich* demonstrates that we are not alone in such a complicated endeavor.

The appellate court "briefly" addresses the issue of intensification on pages 46 through 49 of the 2005 COSA Opinion and the distinction between the enlargement or extension of nonconforming uses and an intensification of such lawful issues. Generally speaking, zoning law does not permit a nonconforming use to be extended; intensification of a nonconforming use is permitted. None of the cases cited by the parties address a situation like the instant case where an intensification of a nonconforming use was approved, lasted for a number of years, ceased for a number of years and then was to be revived.

2.

Originally these proceedings focused on characterizing the lawn mower business operation in the past and considering Hammond's proposal for future operation of a lawn mower business as a nonconforming use of the property. The parties' arguments centered on a 1988 decision by then Baltimore County Zoning Commissioner Robert Haines in Case 89-204 SPH ("Haines decision)

concerning the property. The 2005 COSA Opinion has changed the focus of this proceeding by determining that the Country Store located on Hammond's property is the nonconforming use of the property and the determination before the Board was to consider whether Hammond's proposal, the "current use," is an unlawful expansion of that use or a lawful intensification of that use.

Everyone seems to agree generally what constitutes a "country store" sometimes referred to as a "general store." The phrase is not defined in the zoning regulations or in the case law. This Court believes a "country store" is a general store, in particular, a retail store serving a sparsely populated region, usually stocked with a wide variety of merchandise. Nothing in the record would appear to be at odds with such a description. The RC-4 (Watershed Protection) residential zoning designation of this property is consistent with "sparsely populated region," although the area in 2003 is certainly more populous than it was in 1945.

Commissioner Haines considered the Country Store (the nonconforming use) from its establishment and use of the property up until the time of the request before him. The 1988 Haines decision approved the following nonconforming uses of the property: country store with food and grocery sales and deli operation, household hardware, lawnmower sales and service with plant and tree sales and accessory land and garden supplies and equipment for sale not including contractors or construction companies, landscaping or trucking operation or an automobile service garage. 2005 COSA Opinion p. 11. He

concluded that Dold's lawnmower business was an appropriate intensification of the Country Store at that time.

The record does not contain much information about what was in the Country Store in 1945, nor what was in it in 2003 at the time of Hammond's Petition. At oral argument counsel stated the Country Store in recent years has contained a wide variety of items – household hardware, sundries, food items. According to counsel at oral argument, from 1988 to the present, there have been no seeds, plants, flowers, shrubs, or trees, as there were in the past and at the time of the Haines decision. The Board did not make findings in that regard. No lawnmower sales or service occurred on the property from 1989 to 2003. 2003 Board Decision.

After setting forth excerpts of the legal discussion from the 2005 COSA Opinion, the Board majority makes several findings including a finding on p. 4 that "the sales and service of lawnmowers and related equipment in and of itself is included in the previously and continuing to exist nonconforming use country store." The Board then goes on to

> find the central nature and character of the current use of lawnmower sales and service is unchanged and is the same today as it was allowed and made a part of the originally approved nonconforming use store. It is no way different today than then.

Board Order at p.4. While this finding is emphatic in underscoring the majority's view that Hammond's proposed use is:

> unchanged
> the same
> no way different

it is unclear what is meant. There are two possible interpretations, that is, (1) Hammond's proposal is the same as Dold's business which Commissioner Haines approved as an intensification in 1988; or (2) Hammond's proposal is the same as the Country Store.

A. This Court cannot conclude that there is substantial evidence on this record to support a finding that Hammond's proposed business is no different than the Country Store and is a mere intensification of that nonconforming use. Moreover,

B. This Court cannot conclude that there is substantial evidence on this record to support a finding that Hammond's proposed business is no different than the intensification approved in 1988, that is, Dold's business.

In other words, whether the Board intended (A) or (B) above for the reasons stated herein and in the dissenting opinion to the 2006 Board Decision, this Court does not find there is substantial evidence to support either finding.

The undisputed evidence before the Board was that Hammond's proposal included an expansion of retail activity to a building which was being used for storage at the time he acquired the property, that is Building C. Hammond wants to use Building C for a showroom and storage for new equipment. In addition, Hammond's proposal included using Building B for small engine repair services although in recent years, Building B was also used only for storage. (See 2005 COSA Opinion pp. 3, 12-13.)

Hammond's proposal included the use of large commercial vehicles not previously used on the property, that is, the forklift, the front-end loader and a

large trailer for hauling 5 or 6 mowers. Hammond has also stored a commercial grade wood chipper on the property and a commercial tree trimming truck on which he made repairs. (2005 COSA Opinion pp.14-15.)

There is no discussion by the Board concerning the difference between work on engines up to twenty horsepower and engines up to one hundred horsepower. While such an increase could be an intensification of the previously approved intensification, it is difficult to see how it is an intensification of the approved nonconforming use of the Country Store.

All of the foregoing aspects of Hammond's proposed and current use appear to represent an expansion or enlargement of the Country Store operations in Building A. The 2006 Board Decision does not explain how the front-end loader, forklift, large trailer, commercial grade wood chipper, commercial tree trimming truck are part of any "natural evolution" or intensification of the nonconforming use, that is, the Country Store.

Because this Court does not find substantial evidence on which to affirm the 2006 Board Decision. It need not address Hammond's arguments concerning the restrictions on his business.

Hammond urges the Court to keep in mind that an approved nonconforming use is a vested right entitled to constitutional protection. As such, nothing in this Court's decision affects his nonconforming use of the property for a Country Store, deli and automobile filling station. No legal authority has been cited to support the argument that intensification of that nonconforming use approved in 1988 and not used since that time is entitled to constitutional

protection. But, even if such authority exists, there is no substantial evidence in this record to conclude that what Hammond seeks in the instant case is identical, or substantially similar, to the use approved in 1988. Moreover, this Court does not believe that it would be logical to consider Hammond's proposed business as an intensification of the previously approved intensification without consideration of the use of the property from 1988 to 2003.

The Board appears to have assumed that a lawnmower business identical to the Dold business approved in 1988 was automatically acceptable in 2003 without making any findings. The Board then found that the 2003 Hammond proposal was an acceptable intensification of the Dold business. It is clear, however, that the Board was required to consider the original (1945) nonconforming use, that is, the country store and determine whether Hammond's proposed business is an intensification of the original nonconforming use, that is, the Country Store.

CONCLUSION

As the issues have not previously been the subject of any findings and for the reasons stated in the 2005 COSA Opinion pp. 54-55, on remand the Board should consider Hammond's estoppel and vested rights claims.

Susan Souder
SUSAN SOUDER

Copies sent to:
John C. Murphy, Esq.

Hon. Barbara Jung, *pro se*
11939 Falls Road, Cockeysville, MD 21030

Baltimore County Board of Appeals

3/21/07

IN THE MATTER OF:	*	IN THE
JAMES G. HAMMOND	*	CIRCUIT COURT
	*	FOR
	*	BALTIMORE COUNTY
	*	Case No.: 03-C-~~03-012458~~ 06-11166

* * * * * * * * * * * *

ORDER

Having considered the record herein, the parties' memoranda and oral argument presented on March 15, 2007 and for the reasons stated in the Memorandum Opinion issued this same date, it is this 21st day of March, 2007,

ORDERED the Board of Appeals of Baltimore County *Order of Remand Order of the Circuit Court for Baltimore County Pursuant to Order of the Maryland Court of Special Appeals* dated September 28, 2006 is reversed; it is further

ORDERED, the Matter of James G. Hammond be remanded to the Board of Appeals of Baltimore County for further proceedings consistent with the Opinion of the Court of Special Appeals, No. 00980, September Term 2004, filed November 15, 2005 concerning Mr. Hammond's estoppel and vested rights claims.

Susan Souder
SUSAN SOUDER

Copies sent to:
John C. Murphy, Esq.

Hon. Barbara Jung, *pro se*
11939 Falls Road
Cockeysville, MD 21030

Baltimore County Board of Appeals

Rec'd BOA 3/28/07

2/9/07

FILE COPY

PETITION OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	FOR
	*	
IN THE MATTER OF THE APPLICATION OF **JAMES G. HAMMOND** FOR A SPECIAL HEARING for property located on the W/S of Falls Road, 2,200' N of Broadway Road (11942 & 11950 Falls Road) 8th Election District, 3rd Councilmanic District	*	BALTIMORE COUNTY
	*	
	*	Civil No. 03-C-06-011166
Case No. 03-366-SPH before the County Board of Appeals of Baltimore County	*	

* * * * * * * * * * * * *

Cross-Petitioner People's Counsel's Answering Memorandum

Our first memorandum reviewed the County Board of Appeals majority and dissenting opinions. We focused on the legal insufficiency of the majority's conclusion that Mr. Hammond's use is a legitimate intensification of the original nonconforming use. This contrasts with the grounded and logical dissenting opinion, which holds that this is a serious change in use which is impermissible. Petitioner Hammond filed his memorandum a few days later. It raises four questions. We will address them in the sequence presented.

I. The Conditions Imposed by the Majority Opinion

The first question focuses on the reasonableness of the conditions placed by the majority on the type of equipment and the unloading of equipment. As we observed in

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CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY, MD.

our memorandum, the main thing about the majority's recognition of the necessity for conditions is that it unconsciously reveals that Mr. Hammond's use is actually an impermissible change. It undermines the conclusion that the use is an allowable intensification.

Whether or not the conditions are confusing to Mr. Hammond is immaterial. Moreover, it is not the function of the court to review his submission of evidence or exhibits pertinent to confusion.

II. The Nature of Hammond's Use: Permissible Intensification or Impermissible Change and Extension?

Our first memorandum addressed this issue in detail. We are cognizant of the scope of judicial review of administrative decisions. A careful examination of the CBA majority opinion revealed it to be deficient with respect to supporting facts and sound reasons. Moreover, the record does not contain sufficient facts to prove that Mr. Hammond's use fits within the scope and character of the original nonconforming use.

III. Res Judicata

As we explained at page 7 of our first memorandum, Judge Hollander addressed and rejected the *res judicata* argument, beginning at page 46 of the CSA opinion. Had the Court accepted that argument, there would have been no necessity for a remand to evaluate the character of Hammond's use and do a comparative analysis with respect to the original nonconforming use. In other words, the CSA commanded an inquiry into whether Hammond's use differs from the original nonconforming use enough to constitute a change.

In light of the CSA opinion, the assertion of *res judicata* is a "red herring." We have in mind the definition of "red herring." Webster's II New Riverside University Dictionary (1984, 1988) defines "red herring" as follows, at 985:

> "1. A smoked herring with a reddish color. 2. Something that distracts attention from the matter or issue at hand."

The Circuit Court, therefore, should not be distracted at this juncture by *res judicata*.

IV. Estoppel (and Vested Rights)

a. Overview

The County Board of Appeals majority opinion under review did not address the issues of estoppel or vested rights. Indeed, the original Petition for Special Hearing failed to raise these issues. There was no mention of them in the Deputy Zoning Commissioner's April 11, 2003 Opinion. Petitioner appears to have raised them for the first time at the CBA. The initial CBA panel declined to address them in its Hammond I opinion in 2003. Ultimately, the Court of Special Appeals did include these issues within the scope of the remand ordered in its opinion of November 15, 2005. Judge Hollander also provided a helpful discussion. Our review of the record reveals that there was, and is, no merit to the belated claims pertinent to these issues.

Petitioner Hammond's claims of estoppel and vested rights seek to establish defenses against and avoid enforcement of the law against an otherwise illegal use. Judge Hollander wrote, at page 54 of the CSA opinion:

> "Without a ruling from the Board, we are unable to conduct our judicial review function. Therefore, on remand, in the vent that the Board determines that appellant's business is not a lawful intensification, it should proceed to address appellant's estoppel

and vested rights contentions, and determine whether they apply here to protect appellant."

Hammond based his claims on ZC Haines' 1988 decision and the April 20, 2001 "spirit and intent" letter issued by zoning staff member Lloyd Moxley to approve Mr. Hammond's request to "reestablish the lawnmower sales and service operation." The letter referred to the earlier Zoning Commissioner decision in Case No. 89-204-SPH as having "...*approved the following non-conforming use on said property, country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale.*"

Judge Hollander provided a helpful summary of Hammond's contentions, at pages 51-52. She wrote:

"Appellant contends that he "is entitled to the use by reason of vested rights or estoppel," because "of the change in the County's position." He asserts:

> 'The Haines ruling clearly held that lawn mower sales and service was permitted under the aegis of the country store use. The subsequent decision of the Board of Appeals and the Circuit Court held, contrary to the Haines ruling, that the lawn mower sales and service was a separate non-conforming use and lapsed if not used. The Moxley letter constituted a written determination that the lawn mower sales and service was permitted without any qualifications. Then, after a community group raised objections, Moxley changed his mind and advised that only lawnmowers purchased on the site could be repaired. The Board of Appeals went far beyond the Moxley change of mind and held, contrary to the Haines ruling and the Moxley letter, that the use had expired.
>
> Hammond's acquisition of the property and a year's worth of work did not take place in a vacuum. He relied on Moxley's letter. And Moxley himself did not just sit down and dream up his response. He in turn relied on the Haines ruling, particularly the order which he literally re-stated.'

According to appellant, "where a [zoning law] change occurs, persons who have ... relied on the prior zoning by obtaining a permit and doing work in reliance on that permit are protected . . . by the Maryland law of vested rights/estoppel." He also maintains that he has vested rights in the lawn mower sales and service business because of the substantial construction that he undertook. In particular, he points out that he

> "replaced electrical and plumbing, put in a roll down door, haul away 30-40 truckloads of demolition materials, and removed the greenhouse." As Hammond points out, appellee conceded as much, agreeing that Hammond "'worked like a dog' to get the place ready."
>
> In a related argument, appellant contends that the doctrine of "estoppel" applies here. Apart from his reliance on Moxley's assurances, he states: "Since Haines had the authority to make the ruling, the correct zoning was as set forth in his ruling, up until the time a different ruling was made by the Board of Appeals. The zoning was changed. All the elements are there for the application of vested rights/estoppel."

Petitioner's estoppel and vested rights claims are thus interrelated. They are based on the same set of facts and directed to the same objective. But they involve different theories, as Judge Hollander also recognized at pages 54-55 of her opinion. For different reasons, both of these claims must fail.

The objections to the estoppel claim are both factual and legal. The doctrine of estoppel, as the appellate opinion says (page 54), involves a "theory of equitable estoppel applied in the context of zoning disputes." In this connection, "[I]t is used to achieve equitable results in zoning disputes between the government and its property owners." It is a "legal defense," but, as Judge Hollander recognized, citing Relay Improvement Assoc. v. Sycamore Realty Co. 105 Md. App. 701, 723 (1995), aff'd *sub nom* Sycamore Realty Co. v. People's Counsel for Baltimore County 344 Md. 57 (1996):

> "The Court explained that the Court of Appeals has 'applied the doctrine of equitable estoppel in the context of zoning matters' only on 'rare occasions ....'"

The more recent Marzullo v. Kahl 366 Md. 158 (2001) reiterates that the estoppel doctrine does not, as a rule, apply to allow avoidance of zoning law based on reliance of mistaken information or even permits issued by officials. In brief, the law charges persons dealing with public officials with knowledge of the law and the extent of their authority. Moreover, the law does not allow public officials to give away the legal rights

of the public whether intentionally or by mistake. Petitioner Hammond's estoppel claim thus must fall to the principle that estoppel does not apply against the public. As a corollary, Hammond may not avoid the law to the detriment or prejudice of interested citizens in the neighborhood.

Even if an estoppel theory were available to Hammond, moreover, the facts here would not justify its application. A careful review of Hammond's letter to the zoning office and Moxley's reply reflects that the apparent approval was limited to the resumption of the lawnmower use approved in Commissioner Haines' 1988 decision. To the extent that Hammond's proposed use differs from the earlier use, the Moxley approval does not purport to cover it or give any assurance.

The objections to the vested rights claim go to Hammond's fundamental misapplication and misconstruction of the law of vested rights. Judge Hollander wrote, at page 55 here:

> "The related doctrine of vested rights is "derived from principles of common and constitutional law...." Sycamore Realty, 344 Md. at 67. It provides that "a landowner may rely on nothing other than a property-issued permit, and that a substantial change in circumstances will not be found unless the landowner begins actual, above-ground construction."

If a property owner properly acquires vested rights, then he would be protected from a change in legislation which otherwise would prevent his proposed use.

Here, insofar as Hammond's use is an impermissible extension of the original nonconforming use, then Moxley would have no authority to approve it. Moxley had no authority to make law by a letter. Moreover, Moxley's letter does not even have the legal

status of a building permit, which is issued after a process of review by various agencies. It is one zoning official's comment.

The county's subsequent determination that Hammond should file for a special hearing was not a change in the law. Rather, it was a recognition that there were serious legal questions as to whether Hammond's proposed use is actually a permissible "reestablishment" of the earlier nonconforming use, however intensified by Dold, or whether it crossed the line of impermissible extension. In demanding that Hammond file a petition for special hearing, the County provided the opportunity for a public hearing and procedural due process of law to establish whether or not Hammond's proposal is legitimate. Indeed, when a property owner places the legality of his use in litigation by petition for special hearing, it functions as an acknowledgement that no vested rights exist as a matter of law. This is settled by the recent case of Antwerpen v. Baltimore County 163 Md. App. 194 (2005); see Powell v. Calvert County 368 Md. 400 (2002).

b. There Is No Basis for an Estoppel Argument

While the CBA did not make any finding as to estoppel in Hammond I, it made this statement on page 4 of its opinion:

> "Finally; we are not unmindful of the position in which the Petitioner was placed by virtue of the letter to him of April 20, 2001 from the Baltimore County Department of Permits and Development. It was arguably not unreasonable for him to rely upon that communication to proceed with his project. It is only a matter of conjecture on the part of this Board as to whether or not the writer of that letter, Mr. Lloyd T. Moxley, read the entire Haines opinion or just the Order which accompanied it. This Board believes, however, that the letter in no way altered the facts or the applicable statutes and law in this case, and therefore was not significant in reaching this decision. Moreover, this Board has clearly and traditionally been limited in its jurisdiction to those subject areas specifically granted to it under statute. We are not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by Petitioner in this case for consideration."

Notwithstanding the CBA's reluctance to address the estoppel or related issues, the opinion was on target in its observation "... that the letter in no way altered the facts or the applicable statutes and law in this case ... " There is thus no "estoppel."

It should be kept in mind that Hammond's petition for special hearing to determine the scope and extent of his nonconforming use under BCZR 500.7 functions, in effect, as a declaratory judgment process. Antwerpen v. Baltimore County 163 Md. App. 194, 209 (2005). It requires submission of a site plan, public notice, an opportunity to be heard, and a public hearing and written decision, with appeal rights.

Despite Petitioner's ultimate use of this process, he contended that the April 20, 2001 "spirit and intent" letter from Moxley purporting to authorize his resumption of the uses approved in Commissioner Haines' decision "estops" the county or anyone else from denying his proposed use. In other words, he claimed that even if his proposed use is illegal, he is immune from challenge because he relied on Moxley's letter. This argument is without merit.

Moxley's letter states in its entirety (see CSA opinion, page 6):

> "Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case. 89-204-SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale. Gasoline sales is not included on the list of approved non-conforming uses." (emphasis in original).

At the outset, it is apparent that, in the context of Hammond's stated desire to "reestablish" the earlier use, Mr. Moxley's description covered only the uses described and approved by the Zoning Commissioner in Case No. 89-204-SPH. It did not give

Hammond *carte blanche* to modify, expand, and extend those uses under the guise or umbrella of lawnmower sales and service. For example, it did not cover any potential enlargement of the area used for lawnmower sales and service, new facilities, or addition or expansion of repair equipment and machinery with potentially extended impact on the neighborhood.

Even if Moxley thought he were giving such open-ended permission, or his letter could be so construed, it has been settled law for over 70 years that County departments have no authority to approve or permit a use which conflicts with applicable zoning law. So, even if a building permit is issued, and a property owner has undertaken major construction as a result, such a use remains unlawful. This principle applies with even more force where a property owner has submitted, *ex parte*, a general "spirit and intent" request instead of utilizing the special hearing process, which provides for specification of the use, public hearing, written findings, and appeal rights. The initial avoidance of the special hearing process here is particularly inexcusable here because the prior Zoning Commissioner decision reflected the intense interest of citizens in the area in the scope and extent of the nonconforming use.

The Court of Appeals has consistently rejected estoppel arguments under such circumstances in many cases. Cromwell v. Ward 102 Md. App. 691, 724-25 (1995) includes a recapitulation of the subject. Judge Cathell there wrote:

> "In the case of *Lipsitz v. Parr*, 164 Md. 222, 164 A. 743 (1933), a case seeking injunctive relief by way of a restraining order, a city officer mistakenly issued a building permit for an ice factory when the statute prohibited ice factories. The Court there held:

> A municipality may be estopped by the act of its officers if done within the scope and in the course of their authority or employment, but estoppel does not arise should the act be in violation of law. . . . [T]he ordinance forbade the officials . . . to grant the permit which the plaintiff asked and obtained. . .
>
> . . . [I]t was therefore unlawful for the officers . . . to grant the permit, and it would be unlawful for the licensee to do what the purporting permit apparently sanctioned. A permit thus issued . . . does not . . . prevent the permit from being unlawful nor from being denounced by the municipality because of its illegality. . . . *Every one dealing* with the officers and agents of a municipality *is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled* by their acts when done without legal authority.
>
> So, even where a municipality has the power, but has done nothing, to ratify or sanction the unauthorized act . . . it is not estopped by the unauthorized or wrongful act of its officer . . . in issuing a permit that is forbidden by the explicit terms of an ordinance. . . . *Valentine v. Rds. Directors,* 146 Md. 199, 206 [126 A. 147] [(1924)]. . . . [Citations omitted, emphasis added.]

164 Md. at 227-28, 164 A. 743.

> The Court cited *Lipsitz* in *Inlet Associates v. Assateague House Condominium Assoc.*, 313 Md. 413, 545 A.2d 1296 (1988), a case seeking specific performance and injunctive relief, and also cited *City of Hagerstown v. Long Meadow* Page 725 *Shopping Center,* 264 Md. 481, 287 A.2d 242 (1972), a case of a timely appeal of the denial of a building permit. In *Inlet Associates,* the Court opined that "[c]onsequently, `[e]veryone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority.'" 313 Md. at 437, 545 A.2d 1296. The Court added: "[T]he doctrine of equitable estoppel `cannot be . . . invoked to defeat the . . . enforcement of . . . ordinances, because of an error or mistake committed by one of its officers . . . which has been relied on by the third party to his detriment.'" *Id.*"

In Marzullo v. Kahl 366 Md. 158, 194-99 (2002), the property owner made the estoppel argument, to wit, that it was "fundamentally unfair" to enforce the law because he had obtained a building permit and constructed his "reptile barn." In rejecting this argument, Judge Cathell quoted Lipsitz at length and added an insightful discussion of Town of Berwyn Heights v. Rogers 228 Md. 571 (1962):

"In *Town of Berwyn Heights v. Rogers*, 228 Md. 271, 179 A.2d 712 (1962), Phillip Rogers, a home builder, began construction of a residence in Berwyn Heights. Mr. Rogers had not started construction until he had received building permits from both the county's building inspectors and the Town of Berwyn Heights'[fn15] inspectors. The construction was in compliance with the permits; however, the Town of Berwyn Heights concluded that a mistake had been made in the issuance of the permits so that the residence was being built in violation of a zoning ordinance. The Town of Berwyn Heights filed suit to enjoin the construction of Mr. Rogers.

Mr. Rogers alleged that the Town of Berwyn Heights was estopped from filing suit because it and the county had issued Mr. Rogers building permits, and Mr. Rogers had expended substantial amounts of money in partially constructing the residence. The Court held that:

> "Some authorities hold that the principle of estoppel does not apply against a city, but the majority rule is to the effect that the doctrine of estoppel in pais is applied to municipal, as well as to private, corporations and individuals, at least where the acts of its officers are within the scope of their authority and justice and right requires that the public be estopped. And it has been held that municipalities may be estopped by reason of the issuance of permits. However, the cases and text-writers very generally state that a municipality is not estopped to set up the illegality of a permit. And the issuance of an illegal permit creates no 'vested rights' in the permittee. *We have held above that the permits issued to the appellee were in violation of the zoning ordinance; consequently they were unlawful and* Page 199 *did not estop the appellant [the Town of Berwyn Heights] from prosecuting this suit."* *Id.* at 279-80, 179 A.2d at 716 (citations omitted) (emphasis added).

While we are sympathetic to the plight in which respondent has found himself, we hold that the county is not estopped from enforcing the BCZR as it was applied by the Board of Appeals. We have held, generally, that permits that have been issued that are in violation of the zoning ordinances are unlawful and cannot be grounds for estopping a municipality from the enforcement of the ordinance. We stated in *Lipsitz* that "the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." *Lipsitz*, 164 Md. at 227, 164 A. at 746."

In light of the case law, there is no foundation here to support an argument about "estoppel." The Circuit Court should reiterate that these types of claims are not legitimate and are unacceptable. Where the facts and law do not support a petition, there is no excuse for an "estoppel" argument. This is particularly true where the property owner

initially circumvented the available special hearing process, which would have provided due process of law for all parties. In resorting to and obtaining an informal "spirit and intent" letter of approval to "reestablish" an earlier use, he has attempted to gain leverage and seek immunity for impermissible expansion of a nonconforming use. This is unacceptable.

c. There Is No Legitimate Vested Rights Claim

We repeat and condense the CBA's observation in Hammond I about Lloyd Moxley's April 20, 2001 reply to Hammond's request to "reestablish" the lawnmower sales and service use as part of the nonconforming country store:

"... the letter in no way altered the facts or the applicable statutes and law in this case."

Moxley just restated what ZC Haines had approved in his 1988 opinion. Moxley did not represent that Hammond could expand the nonconforming use in such a way as to cross the line to an illegal extension. Indeed, that was beyond Moxley's scope of authority.

ZC Haines' decision confirmed the legitimacy of the nonconforming country store. Moreover, as understood by the CSA, the 1988 decision allowed the lawnmower sales and service operated by the Dolds as a permissible intensification. To the extent that nonconforming use law recognizes a form of vested rights, it vests only the use which exists prior to the enactment of legislation to forbid the use, together with any "intensification." As explained in Gardner and many other cases, nonconforming use law does not vest the right to expand or extend the use. If Hammond had sought, and Moxley had approved, an expansion or extension of the nonconforming use, it would be invalid.

The initial prerequisite to a claim of vested rights is that the use be a legal use. An extension of a nonconforming use is not a legal use.

In Marzullo v. Kahl *supra*, Judge Cathell rejected not only the property owner's assertion of estoppel, but also his claim of vested rights. 366 Md. at 191-94. There, the property owner ostensibly had much more to rely on than in the present case. He had obtained a building permit which purported to allow his use of the property for a facility to raise, breed, and keep reptiles or snakes. Here is what the Court had to say:

> Respondent contends that he has obtained a vested right to use his property to raise, breed, and keep reptiles or snakes. In his brief, respondent states that in order for him to have a vested right he must satisfy two prongs. The first prong is that there has to be a valid permit. The second prong is that substantial work has to be performed under the permit so that it would be discernable to a member of the general public that work under the permit was occurring. Respondent states that he has satisfied both of the prongs and has a vested right to use the property for his business. Respondent fails to properly apply the prongs and to understand the circumstances of when a vested right occurs.
>
> We examined the law of vested rights in Prince George's County v. Sunrise Development Limited Partnership, 330 Md. 297, 623 A.2d 1296 (1993). In *Sunrise*, we stated that:
>
> > "The third stream of cases involves the issue of vested rights, per se. By a per se vested rights case we mean one invoking 'that doctrine, which has a constitutional foundation [and which] rests upon the legal theory that when a property owner obtains a lawful building permit, [*55] 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 the earlier zoning, we borrowed from the law of nonconforming uses the concept of public knowledge in the neighborhood of the use, saying:

> 'In Maryland it is established that in order to obtain a "vested right" in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use. *See* Feldstein v. LaVale Zoning Board, 246 Md. 204, 210, 227 A.2d 731, 734 (1967), indicating that [*Mayor & City Council v.*] *Shapiro*[, 187 Md. 623, 51 A.2d 273 (1947)] as well as Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 A.2d 747 (1939), established as one of the tests for determining the existence of a nonconforming use "is whether such use was known in the neighborhood."' 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 [*57] 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)."330 Md. at 312-13, 623 A.2d at 1303-04 (alteration in original); *see* Sycamore Realty Co., Inc v. People's Counsel for Baltimore County, 344 Md. 57, 67, 684 A.2d 1331, 1336 (1996).

In the case *sub judice*, respondent obtained a permit and completed substantial construction; however, he is not entitled to have a vested right because there has been no change, applicable to his case, in the zoning law itself and the permit was improperly issued. When respondent obtained his permit and started construction, the BCZR was the same as when petitioners filed for a hearing before the Zoning Commissioner. The Zoning Commissioner and later the Board of Appeals were not making a subsequent change to the BCZR, they were just interpreting [*58] the BCZR as it was already enacted. Based on the decision of the Board of Appeals that we are affirming, respondent's permit was not a lawful permit because he could not lawfully conduct his business in an R.C.4 zone.

Respondent did not satisfy the first prong because his permit was not proper. Additionally, he was not being subjected to a subsequent change in the zoning regulations. Generally, in the absence of bad faith on the part of the remitting official, applicants for permits involving interpretation accept the afforded interpretation at their risk. Therefore, respondent has not obtained a vested right to conduct his business on the property."

There is no vested right to an illegal use. Because Hammond's use or proposed use amounts to or involves an illegal extension of the original nonconforming use, there is no vested right to such a use. Nor could Mr. Moxley authorize such an illegal use even if that were his intent. Indeed, it would undermine the law of nonconforming uses to allow such an illegal extension.

If the CBA's conclusion that Petitioner's use is a permissible intensification were legitimate, then the use would be legal. But if the majority's finding is legally insufficient, then the use is an impermissible extension to which no rights accrue.

d. Summary: Estoppel and Vested Rights

The "estoppel" doctrine is not applicable as a matter of law. The advice given by Lloyd Moxley was limited to the potential reestablishment of the original nonconforming use. In any event, Moxley could do no more. The law does not allow a county official to authorize more than is allowed by law, and any permit or purported authorization for an illegal use would be invalid.

Likewise, the law of vested rights does not afford the Petitioner any right to the illegal extension of a nonconforming use. A petitioner has a right to a use which predates zoning law or has a valid permit and substantial construction prior to a change in the zoning law which otherwise would prohibit it. Here, the right is to a nonconforming use for a country store.

There has been no change in the law in this case. Neither Lloyd Moxley's letter nor the County's subsequent action or requirement of a special hearing involve any change in the law. The issue has been and remains the same. Does the law of

nonconforming uses allow Petitioner's use or not, based on a comparison of his use with the original nonconforming use. Apart from the right to have a legal nonconforming use, there is no "vested right" to an illegal extension.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2007, a copy of the foregoing Cross-Petitioner People's Counsel's Answering Memorandum was mailed first class mailed, postage prepaid to Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030 and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201,Attorney for Petitioner.

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

2/7/07

PM2

PETITION OF JAMES HAMMOND
FOR REVIEW OF DECISION OF THE
BOARD OF APPEALS
IN CASE NO. 03-366-SPH

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY
CASE NO. 03-C—06-011[illegible]

- 9 2007

PETITIONER JAMES HAMMOND'S REPLY MEMORANDUM

James Hammond, Petitioner, filed an appeal of the Board of Appeals decision and filed an Appeal Memorandum with respect to that appeal. Barbara Jung and the People's Counsel also filed appeals and memoranda supporting their appeals. This is a brief reply to the Barbara Jung and People's Counsel memoranda.

Introduction

James Hammond wishes to state that he respects the desire of Ms. Barbara Jung to protect her neighborhood and the legal competence of the People's Counsel. He is willing to abide by conditions designed to protect the neighborhood. He had reached a written agreement with Barbara Jung for the settlement of this matter which was objected to by the People's Counsel. James Hammond is willing to abide by any restriction stated by the Court or Ms. Jung or the People's Counsel to end this matter.

I

The Hammond Lawn Mower Sales and Service Operation Has Never Commenced

The overlooked fact is that James Hammond has never operated the lawn mower sales and service business at the site. After purchasing the property in reliance on the County assurances that he could operate the lawn mower business, he never was able to establish it because a question arose about the zoning the zoning and he has been

embroiled in litigation and hearings for the last three and one half years. His plan is to start business on March 1, 2007.

With all respect, the parties accuse Mr. Hammond of operating an offensive business where it has never even operated. He had lot do a lot of work to clean up the area and do repairs. According to Ms. Jung, Mr. Hammond "worked like a dog" to get the place ready. Noise often occurs in construction and renovation work. But that is over.

Again with all respect, the People's Counsel mischaracterizes the Hammond operation. He speaks of the "disappearance of the country store" and its "transformation into a machine shop", Memorandum p. 27. The country store still exists and is in operation; it will not in any way be replaced by the lawn mower sales and service. The lawn mower operation is not a "machine shop".

The People's Counsel's memorandum is hostile to Mr. Hammond. He describes Mr. Hammond in this way,

"Hammond is a mechanic who came from outside the neighborhood to establish his own new lawnmower dealership for sales and service at a location where none existed for well over a decade", Memorandum p. 23.

Is there something wrong with being a mechanic?

Mr. Hammond didn't come "from outside the neighborhood". He and his wife, Angie, live on Applecroft Lane which is about a half mile north on Falls Road from the Ridge Country Store. They have lived there for many years. Mr. Hammond is a lifelong resident of Baltimore County.

Mr. Hammond suggests it is fundamentally unfair to conjure up visions of conflict where the use has never even commenced. Mr. Hammond asks nothing more or less than that he be given the opportunity to conduct the lawn mower sales and service business which previously existed on the property for many years.

II

THERE WAS AMPLE EVIDENCE TO SUPPORT THE FINDING THAT THE LAWN MOWER SALES AND SERVICE WAS AN APPROPRIATE INTENSIFICATION OF THE NON CONFORMING USE OF THE COUNTRY STORE

A non conforming use is a "property right which that has been long recognized under Maryland law as a vested right subject to constitutional protection", Hammond v. Jung, November 15, 2005, Maryland Court of Special Appeals, p. 39 (CSA Opinion). Not only is the non conforming use itself entitled to protection as a property right, but the cases recognize the right to intensify the non conforming use as long as its basic character is not changed. E.g., County Com'rs v. Zent, 86 Md. App. 745 (1991).

Here we have a non conforming use for a country store, which includes the sale of hardware and lawn and garden equipment. The question is whether the Hammond proposal is a reasonable intensification of the country store. This is the second time this issue has been addressed. Back in 1989, the Zoning Commissioner ruled that the Dold's lawn mower business was a reasonable intensification. According to the testimony recited in the CSA opinion p. 17,

"Dold's sold new lawn mowers and repaired lawn and garden equipment of many types. I recall they had a dealership for Arens riding mowers. They repaired any piece of lawn

and garden equipment anyone brought to them, and there was never any restriction to equipment purchased at the property. They had trailers to pick up equipment".

It was with this background that the Board of Appeals undertook an extensive review and applied the four part test of McKemy v. Baltimore County, 39 Md. App. 257 (1978), to determine whether the Hammond proposal was a reasonable intensification. After a multi-page discussion of the facts, the Board of Appeals found at page 4 of its decision:

"We find that the central nature and character of the current use of lawnmower sales and service is unchanged and is the same today as it was allowed and made a part of the originally approved nonconforming use store. It is in no way different today than then".

Ms. Jung and the People's Counsel many not like this decision but it certainly has an extensive basis in the record of these lengthy proceedings which have stretched out over two decisions of the zoning commissioner, two board of appeals decision, and extensive decisions of the Circuit Court and the Court of Special Appeals. The decision is plainly correct, what existed was a lawn mower sales and service operation, what is proposed is essentially the same. The rule of course is that a decision premised on facts in the record is entitled to be upheld on appeal under the test of whether there was substantial evidence from the record as a whole to support the decision, CSA Opinion p. 29, citing State Highway Admin v. David A. Bramble, Inc., 351 Md. 226, 238 (1998).

III

INTENSIFICATION IS NOT SUBJECT TO THE ABANDONMENT RULE

Ms. Jung argues that the Board did not decide whether the former lawn mower use had been abandoned. The CSA Opinion, p. 43, held that the lawn mower sales and service was not a separate non conforming use and therefore was not an abandoned non-conforming use. The Board did not get into this but the abandonment rule derives from Section 104 of the Baltimore County Zoning Regulations which defines non conforming use as one which existed before the date of the zoning regulations. See CSA Opinion, p. 41. Since an intensified use did not exist before the date of the zoning ordinance, it cannot be subject to the statutory abandonment mandate.

There is a second reason why the intensified use was not abandoned. Here the Board followed the four part test of McKemy and found that the Hammond proposed use was essentially the same as the Dold use, which was an admitted intensification. In effect, the Board went through the intensification tests all over again and found that the Hammond use qualified as a reasonable intensification of the country store use. Since the country store use still continues, it follows that the right to intensify it also continues and this is exactly what the Board found.

IV

CONCLUSION

Again this is a case of the utmost simplicity. Can a lawn mower sales and service business be conducted as an adjunct of a country store use? We now have two administrative decisions which say that it can—the original decision by the Zoning Commissioner back in 1989, and now the decision of the Board of Appeals. This conclusion makes eminent good sense and, whether one agrees with it or not, is surely within the province of the Board of Appeals to decide.

As explained in its original memorandum, James Hammond filed this appeal because he does not understand two of the Board's conditions —that the use is apparently limited to equipment used by homeowners, because there is no essential difference between equipment used by homeowners and equipment used by individuals or businesses who conduct lawn cutting operations; and the restriction on unloading equipment on a Saturday, whether that is aimed at the use of the fork lift, which is understandable, or whether it extends to someone unloading a push mower from the trunk of his car and leaving it to be sharpened, which is unreasonable.

James Hammond again wishes to state his total willingness to agree to conditions on the use. He had reached agreement with Ms. Jung which was not implemented because of the objections of the People's Counsel. He remains ready to obey any conditions deemed appropriate.

Respectfully submitted,

John C. Murphy
516 N. Charles Street
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Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing petition to the Board of Appeals, Court House, Towson, Md. 21204, this 7 day of February, 2007, and to Ms. Barbara Jung, 11939 Falls Road, Cockeysville, Md. 21030, and to the People's Counsel, Court House, Towson, Md. 21204. .

John C. Murphy

1/12/07

PETITION OF JAMES HAMMOND
FOR REVIEW OF DECISION OF THE
BOARD OF APPEALS
IN CASE NO. 03-366-SPH

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY
CASE NO. 03-C—06-011166

JAN

PETITIONER'S MEMORANDUM

REASON FOR THIS APPEAL

The subject matter of this appeal is a decision of the Board of Appeals of Baltimore County dated September 28, 2006 acting pursuant to a decision by the Court of Special Appeals dated November 15, 2005 which remanded the matter to the Board.

The central issue in this case is whether James Hammond may re-establish the lawn mower sales and service business which operated at the Ridge Country Store from 1972 to 1989. In the decision under review, the Board of Appeals ruled that he could, finding that the "central nature and character" of Mr. Hammond's proposed use "is the same today as it was allowed and made a part of the originally approved nonconforming use store". BA Opinion, p. 4. This is a finding of fact which has ample support in the record.

But in the course of approving the use, the Board established two conditions which are the reasons for this appeal. Mr. Hammond is willing to abide by conditions. However, the conditions are such that he doesn't understand what they are.

The first condition is that the "sales and service of lawnmowers and related equipment are to be limited to those items utilized by homeowners only. No sales and service of equipment of a commercial nature will be permitted". BA Opinion, p. 6

There is no real difference between "equipment of a commercial nature" and "items utilized by homeowners only". Many lawnmowers come in two grades, a commercial grade and a regular grade. The commercial grade is basically identical to the regular grade except that it is constructed to be more durable and last longer. It is not larger, more powerful or noisier. Many homeowners buy commercial grade lawn mowers. Many lawn cutting services utilize regular grade equipment. Attached are two photographs from a recent Gravely brochure. The first depicts home mowers. The second is for business use. As can be seen, the mowers are virtually identical.

Mr. Hammond believes that the intent of the Board was to restrict the use of large mowing machines drawn by tractors and used in large scale mowing operations. These might conceivably have a different effect on the community than a simple lawnmower, whether regular or commercial grade.

The second condition is that "no loading, off loading" be carried out on Saturdays. BA Opinion p. 7. This means that a homeowner could not drop off a hand mower on a Saturday. Since the Board says that Mr. Hammond "may maintain business hours on the weekends as desired by him", BA Opinion p. 7, it is clear that the Board intended that he be allowed to operate on Saturdays. But if a homeowner cannot even drop off a mower on a Saturday, the ability to operate means nothing.

Mr. Hammond believes the Board intended to restrict the loading and unloading of equipment which needs the assistance of the fork lift. Earlier the Board ruled a "small forklift will be permitted and limited to the loading and unloading of the trailer" .BA Opinion, p. 6. Mr. Hammond suggests that this was the "loading, off loading" which

the Board intended to restrict. Mr. Hammond is willing for the restriction to prevent loading and unloading which requires use of the fork lift truck.

With respect to both conditions, the suggestions by Mr. Hammond are consistent with the CSA decision which said the decision of the Board should be guided by the evidence in the record, "common sense", and conditions which would not be too difficult to enforce. CSA Opinion, p. 51. Here the evidence in the record was unequivocal that the lawn mower sales and service conducted by Dold's was not restricted—"they repaired any piece of lawn and garden equipment anyone brought to them", CSA Opinion p. 17. As a practical matter the literal conditions of the Board would be impractical to enforce.

Mr. Hammond wishes to state his intention to operate his business in a way that will not harm the neighborhood and to provide a valuable neighborhood service. He is now starting the business in the year 2007. As recounted below, Mr. Hammond was first assured that he could do lawn mower sales and service by a letter from the County dated April 20, 2001. Mr. Hammond then purchased the property and spent time and money fixing it up to the point where he was ready to operate on January 1, 2003. Then the issue arose whether his proposed use was legal, and he filed applications and appeals and it was not until the most recent ruling of September 28, 2006 that he was given the right to operate. During this 3 ¾ years Mr. Hammond has not operated his business. This has had a devastating financial effect on him and his family. He respects the good faith of Ms. Jung and the legal ability and competence of the People's Counsel. He only asks that he be given a chance, a chance which he has not yet had, to demonstrate that he can operate the business successfully and without harm.

FACTUAL REVIEW

The CSA opinion summarizes what has occurred in this case:

A non conforming use at 11942 Falls Road for a Country Store dating back many years before zoning; CSA Opinion, p. 7

Dold's lawn mower sales and service operating at the store from 1972 to 1988; CSA Opinion, p. 7

A decision by the Zoning Commissioner in 1989, the Haines-Peddy decision, recognizing lawn mower sales and service as part of the non-conforming use; CSA Opinion p. 10

A request by James Hammond to the zoning authority, Arnold Jablon, in 2001 for a "Spirit and Intent " letter asking whether lawn mower sales and service was a permissible use, the payment of a $40.00 fee for the letter, and the response from Lloyd Moxley of the Zoning Office that lawn mower sales and service was permissible; CSA Opinion, pp. 5-6

The purchase by Mr. Hammond of the property after receipt of the County letter; subsequent advice from Mr. Moxley that the lawn mower repairs were limited to the repair of mowers purchased on site; CSA Opinion p. 5

A request by Mr. Hammond for clarification that he was entitled to conduct lawn mower sales and service no matter where purchased, a hearing on March 20, 2003, and a decision by Commissioner Kotroco that the repair of equipment was limited to equipment purchased on site; CSA Opinion p.2

An appeal by Mr. Hammond of the Kotroco decision to the Board of Appeals;

A decision by the Board of Appeals dated October 17, 2003 that the non-conforming use for lawn mower sales and service was lost entirely because it had ceased for more than 1 year, and a decision by the Circuit Court for Baltimore County affirming that decision. CSA Opinion, p. 24-28

An appeal by Mr. Hammond to the Court of Special Appeals.

The CSA issued a comprehensive 57 page decision which decided the following and remanded the case to the Board of Appeals. The CSA reversed the Board of Appeals that the lawn mower sales and service had been lost entirely. It remanded the case to the Board to decide the following points:

Whether the lawn mower sales and service was permissible as a reasonable intensification of the non-conforming use; CSA Opinion p.44

Whether the use was virtually identical to the prior Dold's operation, approved by the Haines decision, and therefore entitled to continue under the doctrine of administrative res adjudicata or collateral estoppel; CSA Opinion p.46

Whether the County was estopped from denying Hammond permission to operate a lawn mower sales and service business after it had previously told him that he could do so. CSA Opinion p. 51.

Prior to the remand proceedings with the Board of Appeals, Hammond entered into settlement negotiations with Barbara Jung, the opposing party in the court proceedings and in this matter, and reached a stipulation settling this matter by way of allowing the basic operation to proceed but setting numerous restrictions as to hours, etc. The People's Counsel objected to this settlement and it was not considered by the Board of Appeals.

The Board granted approval for the lawn mower sales and service operation. However, it set two conditions on the approval which caused this appeal.

First, the Board ruled:

"That sales and service of lawnmowers and related equipment are to be limited to those items utilized by homeowners only. No sales and service of equipment of a commercial nature will be permitted. " BA Opinion p. 6.

As explained earlier, it is difficult to determine what this means since regular lawnmowers and commercial grade lawn mowers are interchangeable, used by homeowners and lawn cutting services alike.

The second restriction is that "repairs, including loading or unloading, shall take place only Monday through Friday" ...but "in no event shall loading, off loading, or any repairs be carried out on Saturday or Sunday". BA Opinion, 7.

This again is an extremely difficult condition. A homeowner cannot carry his or her lawnmower in the trunk of the car to get it serviced? A homeowner cannot take a mower to be sharpened on a Saturday? The Board seems not to have realized what it said in this condition. The business under consideration is sale and service of lawn mowers. The condition says "petitioner may maintain business hours on week ends as desired by him, but in no event shall loading or, off-loading, or any repairs be carried out on Saturday or Sunday". BA Opinion, p. 7.

If Hammond can maintain business, what can he do if not repairs or the selling of lawnmowers, which would require loading of the sold item in a car?

ISSUES PRESENTED

1. Were the conditions on the type of equipment and the unloading of equipment reasonable?
2. Was there evidence in the record that supports the finding of permissible intensification?
3. Was there evidence in the record that supports the finding that the use was identical to the Dold use and entitled to administrative res adjudicata?
4. Was there evidence in the record that the County was estopped to deny the use?

ARGUMENT

I

CONSTRUCTION OF CONDITIONS

The two conditions are literally not reasonable. According to the Opinion of the Court of Special Appeals, the decisions of the Board ought to be interpreted in a manner consistent with common sense and the ability to enforce. CSA Opinion, p. 51. The two conditions are not reasonable, consistent with common sense, or able to be enforced, as explained in the Reasons for Appeal, pp. 1-3. Hammond asks that the condition on the type of equipment be limited to large equipment towed by a tractor and utilized exclusively for large scale projects. He asks that the prohibition on loading or unloading on Saturdays be limited to such activities which require utilization of the fork lift.

II

INTENSIFICATION

The Board found that Hammond's proposed use was a lawful intensification:

"The structure and volume of Petitioner's request is not an alteration of activity from the original incarnation; rather it simply reflects the natural evolution of these types of services through the intervening years for the sales and service of lawnmowers provided in the originally approved nonconforming use to those same services provided in today's more advanced technological and use market.

Turning finally to the four part criteria contained in McKemy, supra, the majority finds that the current requested use does in fact reflect the nature and purpose of "lawnmower sales and service" contained in the original nonconforming use; that it is the same manner of service provided as to lawnmowers and related equipment previously provided; that, under the case law the current use in no way can be determined to be a "drastic enlargement" of services previously provided." BA Opinion, p. 5.

These findings of fact are entitled to be followed on appeal. Where an administrative agency makes findings of fact, only if they are arbitrary and capricious will they be upset. CSA Opinion, p. 30, citing cases including United Parcel Serv., Inc. v. People's Counsel, 336 Md. 569, 577 (1964). The CSA Opinion pp. 12-13 describes Hammond's use and the operation conducted by Dold from 1972-1989, pp. 17. The Haines-- Peddy decision held that the Dold's use was a reasonable intensification and the Board here has simply applied that to the Hammond use. Both are plainly correct.

II

ADMINISTRATIVE RES ADJUDICATA OR COLLATERAL ESTOPPEL

The CSA said the Board had to decide if it was required to follow the Haines-Peddy decision by reason of administrative res adjudicata and that the issue there, which "looms large", is whether the business that was the subject of the Haines decision

(Dold's) is "identical" to the business proposed by Hammond. CSA Opinion p. 46. The Board made a finding at page 4:

'We find that the central nature and character of the current use of lawnmower sales and service is unchanged and is the same today as it was allowed and made a part of the originally approved nonconforming use store. It is in no way different today than then". BA Opinion p. 4.

Administrative res adjudicata is a rule of common sense that a Board should not make inconsistent rulings. In McKemy v. Baltimore County, 39 Md. App. 257, 267 (1978), the Court of Special Appeals condemned an attempt by the Board of Appeals to impose conditions on an earlier finding of a non-conforming use which the earlier decision had not imposed. In regard to the earlier findings, Judge Wilner stated: "Both findings, we have stated, were supported by the record at that time and should not be questioned now".

This is exactly what has occurred here. The Haines—Peddy decision allowed the lawn mower sales and service business. The most recent finding by the Board is that the current use of lawnmower sales and service is unchanged. Yet now the Board is placing two limitations on the use which were not part of the original approval—equipment limited to homeowners (?) and no loading or unloading on a Saturday. These conditions were not part of the original approval and should not be allowed now.

III

EQUITABLE ESTOPPEL

Equitable estoppel is relevant because of the compelling personal circumstances of Mr. Hammond. He went to the trouble of inquiring about the permissible use for lawn

mower sales and service and, on the County's instructions, wrote a formal letter and paid a $40.00 fee requesting the County's answer whether he could conduct lawn mower sales and service, and if he could, what were the conditions on such use. No conditions were stated, but now he finds that he can sell only lawnmowers used by homeowners, whatever that means, and cannot be open for pick ups or drop offs on Saturday. The CSA explained that equitable estoppel is used to achieve equitable results in zoning disputes between the government and its property owners, citing Sycamore Realty v. People's Counsel, 344 Md. 57, 63 (1996). Here it is plainly unjust that Hammond have the rules changed after he went ahead and purchased the property in reliance on the County ruling.

CONCLUSION

For these reasons, James Hammond asks that the decision of the Board of Appeals be modified to construe the conditions that the use is allowed provided that no large scale commercial equipment towed by a trailer be used and that no loading or unloading utilizing a fork lift take place on a week end; or in the alternative, that the lawn mower sales and service be allowed without these conditions by reason of res adjudicata or equitable estoppel.

Respectfully submitted,

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing petition to the Board of Appeals, Court House, Towson, Md. 21204, this 12 day of January, 2007, and to Ms. Barbara Jung, 11939 Falls Road, Cockeysville, Md. 21030, and to the People's Counsel, Court House, Towson, Md. 21204. .

John C. Murphy

UNLEASH ONE ON YOUR LAWN

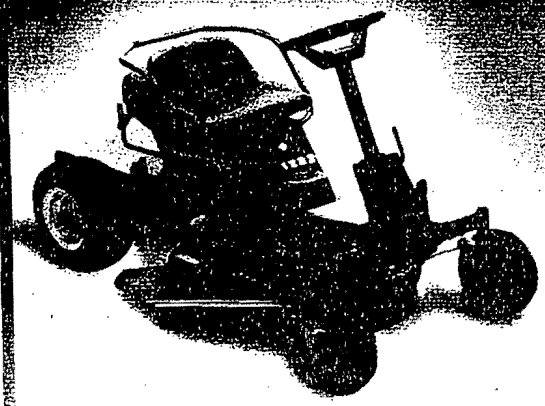
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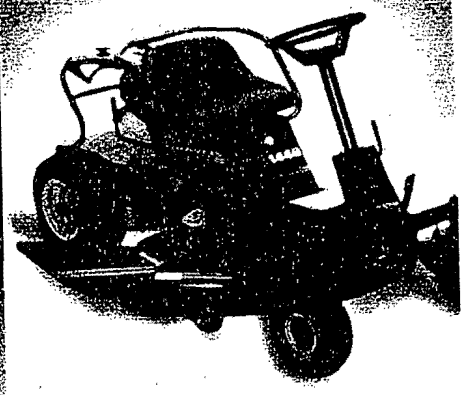
RER 1028 HYDRO

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- 6 mph (forward)/3 mph (Reverse)
- 28" Cutting Width



RER 1232 HYDRO

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- 32" Cutting Width



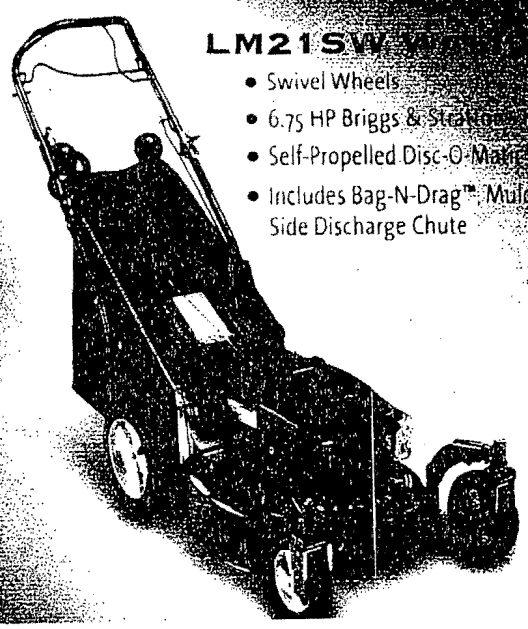
RER 1440 HYDRO

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- Hydrostatic Drive System
- 6 mph (Forward)/3 mph (Reverse)
- 40" Cutting Width
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Step up to new Gravely @ Home Walk-Behind Mowers — the latest additions to our residential mower lineup. These highly maneuverable, extremely durable mowers benefit from the inspired engineering of our professional line. They even feature the exclusive, zero-maintenance Gravely XL Spindle™. So you know you're getting a timesaving, first-class cut at a cost-efficient price. Walk this way!



LM21SW WALK-BEHIND

- Swivel Wheels
- 6.75 HP Briggs & Stratton
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- Includes Bag-N-Drag™ Mulch Plug, Side Discharge Chute



LM21S WALK-BEHIND

- 6.75 HP Briggs & Stratton
- Self-Propelled Disc-O-Matic Drive
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PRO 21 SCH

Expand the capabilities of your Gravely® Pro 21 SCH Walk-Behind with these easy-to-use attachments.



BAG
Easy-on bagger collects clippings for a manicured finish.

MULCH
Insert the Mulchmaster plug, and the Pro 21 SCH recirculates clippings and distributes them evenly.

BAKED-ON POWDER-COAT FINISH
Resists wear from fertilizers, chemicals and moisture.

HONDA OHV ENGINE
All new Honda 5.5 hp GXV Commercial engine.

HEAVY-DUTY 14-GAUGE STEEL DECK
Deep chamber deck and rolled-under lip makes grass stand up for a better cut.

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Eases operator effort by 50 percent or more for better comfort.

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Large capacity increases mowing productivity.

INFINITE SPEED DISC-O-MATIC™ DRIVE
Set the speed of your walking pace up to 4 mph.

RUGGED 1/2" SOLID STEEL AXLES
Includes ball bearings for smoother mowing.

SWIVEL-WHEEL KIT
Two front-mount swivel wheels convert the Pro 21 SCH into a highly maneuverable mower. *(Optional.)*

VALVE COVER PROTECTION BAR
Protects valve cover from debris while mowing.

LAWN DETHATCHER
Builds healthier lawns by loosening thatch. Mounts in front. *(Optional. For use on mowers without front swivel wheels.)*

PRO 21 CH

LEAF SHREDDER
Reduces the volume of leaves by as much as 75 percent. Attaches to the underside of deck. *(Optional.)*

1/8/07

PETITION OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	FOR
IN THE MATTER OF THE APPLICATION OF **JAMES G. HAMMOND** FOR A SPECIAL HEARING for property located on the W/S of Falls Road, 2,200' N of Broadway Road (11942 & 11950 Falls Road) 8th Election District, 3rd Councilmanic District	*	BALTIMORE COUNTY * Civil No. 03-C-06-011166
Case No. 03-366-SPH before the County Board of Appeals of Baltimore County	*	

* * * * * * * * * * * *

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PEOPLE'S COUNSEL FOR BALTIMORE COUNTY'S MEMORANDUM

I. Statement of the Case

This zoning case involves nonconforming use law and the legitimacy of James Hammond's machine shop on Falls Road in northern Baltimore County. The property is located in an R.C.4 Watershed Protection Zone, which ordinarily would prohibit this use. All of the parties have requested judicial review of the County Board of Appeals (CBA) 2-1 decision issued September 28, 2006.

We attach the majority and dissenting opinions as an Exhibit. The case is in its fifth year of litigation. It is in the Circuit Court a second time after a Court of Special Appeals (CSA) remand to the CBA the first time around. Hammond v. Jung (2005).

The Baltimore County Charter assigns People's Counsel to defend the comprehensive zoning maps. Baltimore County Charter Sec. 524.1(b). This case raises

important issues about the integrity of the R.C. 4 Zone, the boundaries set by nonconforming use law, and the impact on the surrounding neighborhood.

Mr. Hammond filed the current Petition for Special Hearing on February 10, 2003 to "approve the clarification that lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site and to amend the prior orders in Case # 89-204-SPH and 94-14-SPH, if necessary." The case began at the Deputy Zoning Commissioner (DZC) level. It went to the CBA – which held a *de novo* hearing and issued an October 17, 2003 opinion. It landed in Circuit Court for judicial review, and then reached the CSA. The CSA entered a lengthy opinion and remand order on November 15, 2005. By then, two of the three CBA panel members who participated in the 2003 proceedings had departed. The CBA assigned two new members to the panel. See People's Counsel v. Country Ridge Shopping Center 144 Md. App. 580 (2002).

When the case resumed at the CBA in early 2006, Hammond proposed a "settlement" with neighbor Barbara Jung. People's Counsel explained, however, that the case must proceed in a legal process subject to zoning law and the CSA remand order. The resolution would affect all property owners in the neighborhood and the public in general. Therefore, it could not be resolved by a privately negotiated settlement, whether by some or all of the parties. See Attman/Glazer v. Mayor & Aldermen 314 Md. 675 (1989).

At the end of the hearing February 28, 2006 hearing, the CBA asked for memoranda. Upon public deliberation, a 2-1 majority, Lawrence Stahl and Edward Crizer, found Hammond's lawn and garden equipment sales and service is a legitimate

intensification of the original nonconforming use for a country store, subject to specified conditions. The CBA issued its final opinions on September 28, 2006. The dissenter, Margaret Brassil, found Hammond's use is not a legitimate intensification but rather an illegal change, incompatible with the use legally established prior to current zoning law.

Petitioner Hammond, dissatisfied with the majority's conditions, has filed a petition for judicial review. People's Counsel filed a cross-appeal because the majority decision to approve the nonconforming use is vague, conclusory, and legally insufficient. In contrast, the dissent articulates specific facts and legal reasons which show inescapably that the nonconforming use has terminated. Barbara Jung has also filed a cross-appeal to challenge the CBA's allowance of Hammond's new use of the property.

II. Judicial Review

The CBA decision involves nonconforming use law. A nonconforming property use is one which the law affords the right to continue when established prior to the enactment of a zoning law which otherwise does not permit it. Nevertheless, the law provides that nonconforming uses terminate upon any change, abandonment, or discontinuity of the use. The law thus intends that nonconforming uses should gradually disappear and new legal uses should emerge.

There is tension between the legal right of a nonconforming use to exist and the mandate for termination upon change, abandonment, or discontinuity. Nonconforming use cases are frequently contentious because termination of a use is at stake. Property owners resist termination and seek to perpetuate such uses despite apparent changes. In response, the Court of Appeals has drawn a line between permissible "intensification"

and impermissible "extension" or "expansion" of the original use. An "intensification" does not amount to a "change." The use may continue. But an "extension" or "expansion" equals a "change." This terminates the use. While there is no mathematical formula for the boundary line between intensification and extension or expansion, the body of appellate case law provides clear guidance and standards.

Nonconforming use cases present a high degree of difficulty. They require historical investigation and intellectually demanding legal analysis. The Court of Appeals recently issued Purich v. Draper Properties, Inc. ___ Md. ____ (2006), No. 9, Sept. Term, 2006. The opinion allowed for deference to agency findings of fact based on substantial evidence. Nevertheless, it reversed the agency decision to allow a nonconforming use because "... premised upon an erroneous conclusion of law." Page 14.

Because the agency strayed from the correct legal standard, the Court did not need to discuss another equally important dimension of judicial review. It is a prerequisite to legal sufficiency that an agency support its opinion by adequate and specific findings of fact and legal reasons, as opposed to boilerplate, conclusory, or superficial assertions with respect to satisfaction of the relevant legal standard. An agency recitation of conclusions without articulation of adequate supporting facts often provides a clue that no such facts exist. That is the problem here.

Administrative officials exercise delegated powers. Effective judicial review is crucial to check and balance unsupported, arbitrary and capricious agency action. A statement of facts and reasons is fundamental to the rule of law. Agency "discretion" is not a "blank check."

There must be a record to review. The agency must then identify the relevant facts, make specific findings of fact, and supply sound reasons to relate these findings to a supportable legal conclusion. The Court of Appeals has underlined the necessity of written findings and reasons to support agency decisions in United Steelworkers v. Bethlehem Steel Corporation 298 Md. 665, 679-80 (1984):

> "Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action, the court may not uphold the agency Order unless it is sustainable on the agency's findings and for the reasons stated by the agency.... Were we to search the subject record for evidence sufficient to support any one or more of the theories advanced by Steelworks or by MOSH, and then to decide if that theory constitutes a violation of the general duty clause, we would be performing the administrative function the MOSHA commits to the Commissioner, and not our proper function of judicial review." (Citations omitted).

The Court has applied this principle in many cases. In Harford County v. Preston 322 Md. 493, 504-05 (1991), the Court found insufficient conclusory findings with respect to incompatibility, intensity of use, and adverse impact in a special exception case. In Bucktail v. County Council 352 Md. 530, 552-59 (1999), the Court found insufficient the conclusory findings with respect to failure to comply with Critical Area, Comprehensive Plan, compatibility, and other criteria. As Judge Rodowsky reminded us, "Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." 352 Md. at 553.

Overpak v. Baltimore 395 Md. 16 (2006) recently addressed the quasi-judicial function of a Baltimore City Council decision on a PUD amendment. Judge Glenn Harrell wrote, at page 39 that, "Zoning matters ... depend upon the unique circumstances

of a particular location and must be *analyzed* individually." (Emphasis supplied). He then wrote, at page 40, most pertinent here,

> "It is only by looking to the particular circumstances of an affected parcel and its immediate environs that a body can make the necessary findings and conclusions called for by statute, ordinance, or regulation. These site-specific findings of fact are necessary not only to inform properly the interested parties of the grounds for the body's decision, Mehrling v. Nationwide Ins. Co., 371 Md. 40, 64, 806 A.2d 662, 676 (2002) (citing Blue Bird Cab Co. v. Md. Dep't of Employment Sec., 251 Md. 458, 466, 248 A.2d 331, 335 (1968) (noting that "a fundamental requirement of the due process of law in a quasi-judicial proceeding is the right of the parties to be apprised of the facts relied upon by the tribunal in its decision."), but also to provide a basis upon which judicial review may be rendered. Pattey v. Bd. of County Comm'rs for Worcester County, 271 Md. 352, 359-60, 317 A.2d 142, 146 (1974) (restraining judicial review of a legislative body's zoning decision to the record); Bd. of County Comm'rs for Prince George's County v. Ziegler, 244 Md. 224, 229, 223 A.2d 255, 257 (1966) ("[I]t is clear that without a record of the facts on which the zoning authority acted or a statement of the reasons for its action, the reviewing court could not properly perform the duty it had of determining whether the action of the zoning authority was arbitrary or capricious.")."

The present trial record contains specific facts and discernible history. There is no excuse for the CBA majority's failure to make specific and meaningful findings of fact. But the majority chose to state superficial conclusions. It defied the rule against opinions based on broad conclusory statements and boilerplate language. In contrast, the dissent presented detailed and specific findings, which reflectively highlighted the majority's failure. This is, to paraphrase Dickens, a Tale of Two Opinions.

The failure of the majority is exacerbated by its recognition of the need for conditions to limit the nonconforming use approval. This is equivalent to an admission that Petitioner's use effectively exceeds the legitimate boundaries of the original nonconforming use. In a sense, the situation is analogous to Purich.

III. The Remand

Hammond's Petition for Special Hearing requests a determination whether Petitioner's proposed use for lawnmower sales and service to the general public, including engine repair facilities in Building B, fits within the scope of the established nonconforming use for a country store. Judge Eileen Hollander's CSA opinion concluded that Zoning Commissioner Robert Haines' 1988 decision in Case 89-204 approving accessory use of "*lawnmower sales and services*" allowed this as an "intensification" of the nonconforming use for a country store. Therefore, the undisputed abandonment or discontinuation of such sales and service did not terminate the underlying nonconforming use. She also wrote (page 51) that the part of the order which allowed lawnmower sales and service did not forbid service provided to lawnmowers purchased elsewhere.

At the same time, Judge Hollander explained that it does not follow that Petitioner Hammond's use must be approved as a reincarnation of the earlier use. She rejected Hammond's contention that the principles of "*res judicata*," "collateral estoppel," or "claim preclusion" require approval of Hammond's use. Comparing the proposed use with the original use, identified (CSA opinion, page 7) as "Dold's Lawnmower Sales and Service" in conjunction with "Ridge Country Store," Judge Hollander wrote, at page 46:

> "Even if we agreed with appellant's construction of the Haines Decision, we hasten to add that it is not at all clear that the business that was the subject of the Haines Decision is, indeed, identical to appellant's proposed business. In deciding whether the Haines Decision is entitled to preclusive effect, that issue looms large"

Because Hammond's proposed use could differ from the earlier use as to the scope of operation, extent of facilities involved, and impact on the neighborhood, Judge Hollander recognized a substantial question as to whether his use goes beyond intensification and

amounts to an "extension" of the original nonconforming country store. She confirmed that the law governing nonconforming use disallows such "extensions."

The CSA assigned the CBA the task to make findings of fact and conclusions of law as to whether Hammond's proposed lawnmower sales and service use and facilities departs from the original country store use in spirit, intent, function, and impact. The CBA had to decide whether Hammond actually proposed a legal intensification or an impermissible extension or expansion.

IV. The CBA's October 17, 2003 Opinion (Hammond I)

Hammond I stated on page 1 that "the facts and chronology of this case are uncontroverted by the parties." It described the "country store" use which predated zoning and the operation under the ownership of Robert and Nancy Dold from 1972 to 1988 as "including a lawnmower repair shop." This led to the 1988 zoning controversy and opinion by ZC Haines, which confirmed the nonconforming use, but, in the CBA's view, on page 2, "... limited repair services only to those machines actually sold on the site." The CBA's errant construction of this limitation as an essential element of the nonconforming use, rather than a mere "intensification," resulted in the remand.

Hammond I went on to underline on page 2 Hammond's April, 2001 letter, where he asked the PDM Department for a letter of spirit and intent to "clarify and **reestablish** the nonconforming use certification of the above-referenced property." (emphasis in original). It observed in early 2003, prior to Hammond's "starting once again to sell and repair lawnmowers ...," the community association communicated its opposition. The

County Zoning Office, moreover, issued a violation notice. There followed Hammond's request for this special hearing to clarify and legitimize his use.

The CBA then discussed nonconforming use law, the BCZR 101 definition, BCZR 104.1, and of Prince George's County v. E.L. Gardner 293 Md. 259 (1982). Pages 3-4. In this context, it found that the lawnmower sales and service use was itself a particular nonconforming use and that its abandonment after 1988 caused its termination.

Because of these findings, Hammond I did not compare Hammond's use with the original country store use or Dold's accessory intensification. It is this very comparison, and the ensuing legal consequences, which the CSA remand asked the CBA to resolve.

V. BCZR 104.1 and the Case Law

Baltimore County Zoning Regulation (BCZR) 104.1 states,

> "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."

This essentially allows nonconforming uses to exist unless changed, or abandoned or discontinued for a year or more. It reflects the policy of the law to eliminate nonconforming uses gradually, and not to foster their evolution or growth. In Gardner, *supra*, 293 Md. at 267-68, Judge Rita Davidson wrote:

> "This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses. In *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 307, 129 A.2d 363, 365 (1957), this Court said:
>
> "Nonconforming uses have been a problem since the inception of zoning. Originally they were not regarded as serious handicaps to its effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions

on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property owners at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun. Nevertheless, the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned, and the ordinances forbid or limit expansion of nonconforming uses and forfeit the right to them upon abandonment of the use or the destruction of the improvements housing the use."

Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *The Arundel Corp. v. Board of Zoning Appeals of Howard County,* 255 Md. 78, 83-4, 257 A.2d 142, 146 (1969); *Stieff v. Collins,* 237 Md. 601, 604, 207 A.2d 489, 491 (1965); *Colati v. Jirout,* 186 Md. 652, 655, 657, 47 A.2d 613, 614-15 (1946); *Beyer v. Mayor of Baltimore,* 182 Md. 444, 446, 34 A.2d 765, 766 (1943); *See Kastendike v. Baltimore Ass'n for Retarded Children, Inc.,* 267 Md. 389, 397, 297 A.2d 745, 749-50 (1972).

Whether a nonconforming use can be changed, extended, enlarged, altered, repaired, restored, or recommenced after abandonment ordinarily is governed by the provisions of the applicable local ordinances and regulations. *Feldstein v. La Vale Zoning Board,* 246 Md. 204, 211, 227 A.2d 731, 734 (1967); *Phillips v. Zoning Comm'r of Howard County,* 225 Md. 102, 109, 169 A.2d 410, 413 (1961); *Board of Zoning Appeals of Baltimore County v. Gue,* 217 Md. 16, 21-22, 141 A.2d 510, 513 (1958). These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses. *Mayor of Baltimore v. Byrd,* 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati,* 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore,* 180 Md. 88, 96, 23 A.2d 15, 18 (1941); *see City of Hagerstown v. Wood,* 257 Md. 558, 563, 263 A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County,* 220 Md. 48, 59, 151 A.2d 144, 150 (1959)."

The law does not allow a change in the nonconforming use by a kind of "creeping" process. Phillips v. Zoning Commissioner or Howard County 225 Md. 102 (1961). A property owner must prove both continuity and persistence of the same nonconforming

use. A change or extension may come quickly or slowly. Calhoun v. County Board of Appeals of Baltimore County 262 Md. 265 (1971).

The Court discussed the line between intensification and extension in Jahnigen v. Staley 245 Md. 130 (1967). There was a nonconforming marina. The new owners expanded the use by extension of the original pier and by construction of a new pier and other facilities. They also sought to increase the number of rowboats available for rental and amount of rental space for dockage or wet storage of boats. The opinion explained:

> "The basic premise underlying zoning regulations is to restrict rather than expand nonconforming uses. ... However, an intensification of a non-conforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used." Citations omitted.

Turning to the issue at hand, Judge Marbury wrote:

> "We agree that the construction of a new pier and other facilities, and the rental of space for the dockage or wet storage at any facilities other than the ninety foot wharf and T, which were in existence prior to the effective date of the zoning ordinance, were invalid extensions of the non-conforming use. However, we hold that the rental of rowboats cannot be so limited. Any increase in the number of rowboats rented would be an intensification of non-conforming use and would not be an extension."
>
> "The right of a landowner to continue the same kind of use to which the property was devoted on the critical date does not confer on him the right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use. ... Appellants argued that the launching of boats by means of a travel lift and ramp was an intensification of the launching that was done by the Kirchenbauers. The evidence showed that only a dozen or more boats launched in the years prior to the enactment of the ordinance. There was no permanent launching site nor structures to aid in the launchings. Boat launching was performed at no specific place during the years the Kirchenbauers owned the property, and it was so infrequent as not to have been part of their business. The testimony as to the launching of boats was too vague and inconclusive to establish that such use was regularly made before 1949, or that it was carried on thereafter. ... The launching ramp was constructed on the twenty-five foot strip which the Kirchenbauers purchased in 1962. The appellants cannot now set aside that particular portion of their property and construct a launching ramp." Citations omitted.

"As to the storage of boats on the property, there was nothing in the record to show that the former owners allowed individuals other than themselves to store or repair boasts on their property, other than at the shoreline, prior to the adoption of the zoning ordinance. After the ordinance was passed a few boats belonging to others were stored on the property, but again the number was insignificant. Also there was little repair work done on boats other than on the ones that were owned by the Kirchenbauers. Again the testimony as to the storage, repair and maintenance of boats other than those owned by the Kirchenbauers was too vague and inconclusive to establish that such use was regularly made before 1949."

This illustrates the type of comparative analysis involved in the assessment of the continued vitality of nonconforming uses.

A decade later, McKemy v. Baltimore County 39 Md. App. 257 (1977) addressed changes in nonconforming commercial parking associated with permitted business uses across the street, which also changed over time. The Court held that the expansion of the nonconforming parking to adjacent lots was unlawful. 39 Md. App. at 265. It also held that the nonconforming use did not extend to dismantling of vehicles, storage of disabled vehicles, junk, or debris, or any operations accessory to a garage. Ibid. Then, with respect to the CBA's approval of parking for fuel trucks on the original lots in conjunction with a fuel oil business as consistent with the original nonconforming parking in conjunction with restaurant use, the Court engaged in a more detailed analysis, which resulted in a remand. Judge Wilner wrote, 39 Md. App. at 269-70:

"Upon those findings, it was incumbent upon the Board to determine, factually, whether those expanded uses represented a permissible intensification of the original use or an actual change from what the 1969 Board found existed in 1945 "to any other use whatsoever." In making that determination, the Board was not required to assume, and should not have assumed, that the lowest common denominator was "parking", or even "parking" in conjunction with a business across the street. In deciding whether that current activity is within the scope of the non-conforming use, the Board should have considered the following factors:

"(1) **To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;**

(2) **Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature, and kind:**

(3) **Does the current use have a substantially different effect upon the neighborhood;**

(4) **Is the current use a "drastic enlargement or extension" of the original nonconforming use."**

Judge Wilner then added this observation,

> The Board undoubtedly had some of these factors in mind, but its consideration of them was obviously flawed when it viewed the issue simply as "nonconforming parking in direct relationship to the business function" across the street. Because of its inappropriate reliance on that test, the Board failed to come clearly and completely to grips with these more relevant criteria. For that reason, and not because of any inherent unsoundness in the findings themselves, the conclusions of the Board as to whether the 1974 activities of Mr. McKemy with respect to Lot 442 and Lots 378-384, violate the county zoning regulations cannot stand. Instead, we shall remand that part of the case embodied in paragraphs numbers 1 and 2 of the 1974 order of the Zoning Commissioner to the Circuit Court with instructions that it, in turn, remand the case to the Board for reconsideration. The Board should consider not only whether, and to what extent, any such current uses exceed the permissible limits of the original non-conforming use, but, if it finds such excess, whether, by virtue of § 104.1 of the county zoning regulations, the entire nonconforming use has been lost."

Consistent with this reasoning, a change in the volume of lawnmowers sold and serviced would typically reflect intensification. Here, as the CSA indicated, it is impractical to differentiate the service provided for lawnmowers sold at the site from those sold at other locations. On the other hand, any expansion in the area occupied by the nonconforming use would be probative evidence of an extension. In the same vein, an expansion of facilities would ordinarily suggest an extension. Therefore, any capital improvements which go beyond maintenance or restoration of Dold's facilities (and thus part of the previously approved country store) would indicate an extension of the original nonconforming country store use. It is also relevant to consider the extent to which any

such improvements are likely to produce a more substantial impact on the neighborhood.

The key question presented is thus whether Hammond's proposed use is sufficiently similar to the Dold operation to fit with its spirit and intent, or whether by virtue of alteration in facilities, equipment, product, area or building use it crosses the line to an extension. It is not enough simply to say that both the Dold and Hammond uses involve "lawnmower sales and service." The uses in Jahnigen, old and new, were marina uses. The uses in McKemy, old and new, involved the parking of motor vehicles for a business use across the street. Both cases, however, called for detailed analysis of the nature and extent of change in use in order to differentiate permissible intensification from an impermissible extension.

The Court has also warned in Phillips v. Zoning Commissioner 225 Md. 102 (1961) of the dangers of evolution, by a sort of "creeping process," to a use different in character from the original use. There, the original use was a used car lot and a warehouse for the storage of second hand furniture. It gradually evolved into a junkyard, which the Court found to be an impermissible extension.

Nationally, many controversies have arisen as to the impact of addition or expansion of facilities, extensions to new parts of a building, and the additions of new products, activities, or services. These usually involve impermissible extensions. On the other hand, a change in volume, intensity or frequency usually denotes a permissible intensification. Anderson, American Law of Zoning (Young, 4th Ed. 1996), Secs. 6.47 to 6.50 surveys the law and will be discussed below.

VI. History of the Current Controversy

The original nonconforming use dates from prior to 1945, when zoning first came to Baltimore County. The current zoning is R.C. 4, Watershed Protection. As of the 1988 decision of Zoning Commissioner Haines, the zoning was R.C. 5, Rural-Residential. His opinion states the property has always been zoned residential. Therefore, a business use in existence before the 1945 advent of zoning and which was used continuously thereafter became a nonconforming use.

Hammond's proposals and activities raised concerns among area citizens and the Falls Road Community Association that his use goes beyond the original country store/lawnmower use and was heading in the direction of a service garage or, as neighbor Ms. Barbara Jung described it in her opening statement at the Hammond I hearing, a Jiffy Lube. This led to the zoning office's request Hammond file a petition for special hearing.

The main idea is to compare and understand the original nonconforming use, the Dold lawnmower sales and service intensification circa 1988, and the Hammond use circa 2001-06. The problem is complicated by the time passed since 1945, the vagueness of the description of the Dold operation, its discontinuity for many years, and the elasticity in the descriptions of Petitioner Hammond's proposed operation. The available sources of the facts are ZC Haines' 1988 decision and the 2003 CBA transcript.

VII. The 1988 Zoning Commissioner Decision

The 1988 petition (89-204-SPH) lists the use of Building A from 1915-50 as "Han's Feed & Grocery Store – country store;" 1950-55 as "Enge's General Store, - grocery, country store;" from 1955-72 as "Sprecker's General Store --- gasoline, country

store, hardware, grocery, deli; 1972-82 – Dold's Lawnmower Sales & Service – country store – gasoline, etc.; 1982-88 as "Ridge Country Store – gasoline, country store, grocery, antiques." It lists the use of Building B from 1962-82 as "Scientific Plant Service – Sales of replacement trees and plant supplies and materials; and from 1982-88 – Dold's Lawnmower Sales & Service – shrubs and tree sales (Christmas trees), plant supplies and materials." According to the Petition, Mr. Dennis Peddy intended to purchase the property and use it "to sell flowers, plants and related materials and supplies," and to "sell ... Christmas trees" seasonally. There was no mention of any intent by Mr. Peddy to sell and service lawnmowers. The petition requested a finding "... that the intended use is in compliance with the [BCZR]" as " a continuation of a nonconforming use."

ZC Haines, in his November 30, 1988 opinion approving the proposed Peddy use, described the original use "loosely described as a Feed and Grocery Store which became a Country Store or General Store over the years." Page 2. A Mr. Griffin and several witnesses testified to the continuity of the operations, including the addition of lawn and garden supplies. These were apparently incidental to the store use. After a lengthy discussion of the law, ZC Haines noted that there had been changes in the use of the site. He wrote, at pages 6-7:

> "The basic operation has remained the same, however, the services have been added to altered somewhat over the years. The lawn mower sales and services is a changed, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation.
>
> "There is a refinement in the sense that plant sales and the Christmas tree sales are seen as accessory activities. These accessory activities are seen as an outgrowth of the Lawn and Garden Supply operation. The hardware, deli and gasoline sales have been present on site since prior to January 7, 1945 or have not expanded in the nature or scope of operation.

> "There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation [sic] being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site."

At the time, there was no real controversy over Dold's lawnmower operation. Apparently, it was a mild family operation which caused no complaint. Moreover, Peddy did not intend to continue this part of the country store. In this context, there was no specific description of the nature and extent of the lawnmower sales and service, hours of operation, or impact on the neighborhood. There was no description of the type, size, and scale of the equipment, facilities, or vehicles used. There was no specific description of the type of products. There was no description of the layout of Building B or what occurred there. The site plan gave no specific description of the operation.

The ZC's finding that lawnmower sales and service amounted to legitimate intensification of the country store was a general conclusion. It was incidental but not central to the finding that Peddy's proposed use for other country store purposes was a legitimate continuation. The most we can gather from the ZC decision is that the Dold operation fit within the original country store framework and was relatively innocuous. There was apparently no contracting, construction, landscaping, or trucking operation. There was no automotive service garage.

The vagueness of the description of the lawnmower sales and service is understandable in the context of the issues presented in 1988. But it is one of the significant contributing factors to the twenty-first century controversy over Mr. Hammond's use. Moreover, with the Dold operation having closed in 1988, evaluation of

Mr. Hammond's operation depended, in part, on a reconstruction of a description of the Dold operation.

VIII. The 2003 CBA Hearing

a. The 1945-Present Country Store and Dold's Operation 1972-88

At the 2003 CBA hearing, the parties focused on a number of issues. These included the history of Hammond's interaction with the zoning office, the discontinuity of the lawnmower operation, and the perceived noise and other impacts from Hammond's operation. There was some description both of the old Dold operation as well as Mr. Hammond's operation, albeit less specific than would be ideal. To this, we now turn.

There was no witness available who could describe the original country store use circa 1945. Robert Dold, however, appeared and described his business from 1972-87 as involving sale and repair of "lawnmowers, chain saws, weed eaters, blowers, different type of homeowners' equipment." T. 77. He said he had and repaired "five different pieces of [lawn and garden] equipment. T. 77-78. He started out in the store and "moved around back," into the building in the back. T. 78. He had a trailer and a truck. T. 79. He also had two air compressors, to remove nuts and bolts and take blades off, and the like. T.82. One was seven horsepower, and the other a five horsepower compressor. T. 82. Martin Homer, worked with Mr. Dold, said he worked on "other equipment besides mowers, chain saws, tractors, stuff like that. Mowers. Wood splitters." T. 83. He said he used impact wrenches and a compressor. T. 86. Paul Stein described the Dold operation as doing repairs, chain saws, lawnmowers. T. 98-99. He also described how the wood was rotting behind the store.

Barbara Jung testified that the noise produced by the Dold operation was not noisy like Mr. Hammond's operation, at T. 110-11.

> "A. Yes. And the sort of static thing an air compressor does, and once it builds up all its air pressure or not, it's not the constant rumble you get, it's the screeching noise you get from the impact wrenches, or whatever they are. I could only compare it to when I go get my tires changes, that high screeching noise.
>
> "Q. You heard the testimony of Mr. Dold and Mr. Homer, that they had power wrenches there and they normally use power wrenches in repairing the lawnmower equipment, such as equipment you brought?
>
> "A. I heard that, but I will tell you, if I heard them the way I hear Mr. Hammond, I would not have supported them."

In reply to a further inquiry, she added,

> "Well, I responded when I called you back. What I said was is that I certainly thought the cosmetic things were workable, and he was willing to do that, but I could not agree to him being able to make that noise five days a week during the hours he said." T. 111-12.

b. Hammond's Use, Actual and Proposed

Based on ZC Haines' 1988 decision, Hammond stated that lawnmower sales and service were among the uses "... permitted on the site in perpetuity, that there are no time limitations or restrictions on the continuation of the use of the property." T. 31.

Hammond described his total renovation of the store building in the front. T. 35. As to the building intended for lawnmower sales and service, he said,

> "A. That building was completely rewired including the wires from the pole, completely plumbed. Again, it had to have a terrific amount of demolition.
>
> We had hauled away at least thirty or forty truckloads of debris that was left there by the previous tenant." T. 35-36
>
> "Q. Did you do anything to the electrical system?
>
> "A. Replaced it all in the rear building including ninety percent of the wiring. All the plumbing, basically.
>
> "Q. Is that door new?

"A. I have a roll-up door. They had a kind of makeshift .... A greenhouse on the back of the building, that I removed. It was covering the door, and I replaced it with a door. He had an opening there."

He described his use as sales and service of several brands of lawnmowers, push and riding mowers, chainsaws, weed eaters, and leaf blowers and tillers, a "full line of garden equipment." T. 38. He described the "Building B" renovations as for a "small engine shop for lawnmower repair." T. 41. He mentioned a third building, "Building C," a small building for storage of new equipment for sale." T. 45-46. As he put it,

"Actually, I'm going to make a showroom out of that, and repair done in Building B." T. 46.

He would also use "covered area on the front of the building ... " and an "area behind the building, which is fenced" to place things waiting to be repaired. Ibid.

Hammond described the proposed hours of operation as 8 A.M.-5 P.M. Monday to Friday and 9 A.M.-4 P.M. on Saturday. Bulk mulch would not be sold, just in bags. T. 49. He also proposed screening of the property along the Falls Road frontage. T. 49-51.

On cross-examination by Ms. Jung, he testified to the use of a forklift to unload new equipment. T. 55. He also has a front end loader to move things about the property. T. 55-56. He planned to buy a trailer to put five or six mowers on in addition to service. T. 56. He described a small one horsepower air compressor in the store for tires and a seven and a half horsepower air compressor in the back building that he uses with power tools. T. 57. He also admitted to having repaired an engine for a large commercial tree-trimming truck, which was there about a month; to repairing several snow-blowers for friends; and to repairing a piece of commercial equipment. T. 57-59.

Upon examination as to Ms. Jung's previous inquiry as to the number of vehicles parked and the appearance of the property, and his response that he "could run a truck facility on the property, he responded, at T. 60:

> "A. Not in so many words. I said there had been a trucking facility at the property prior."

As to products, he admitted he had testified that he planned to work on engines of up to 100 horsepower, whereas Dold had worked on engines up to 20 horsepower. T. 61.

He added that he envisioned having two part-time employees in the lawn and garden business, in addition to an employee in the store, and that he would do the majority of the mechanical work himself. T. 66.

Barbara Jung outlined her concerns about Mr. Hammond's operation:

> "When I supported Bob Dold in 1988, he was a known quantity." T. 104.
>
> * * *
>
> "But it's just --- I don't know how he can agree to regulate the noise when he's trying to run a business, and I couldn't agree to him making the noise that I hear from coming [sic] there, that I didn't hear from Bob's work." T. 106.

She also pointed out that Hammond was not responsive "until the authorities got involved." T. 107.

She concluded, at T. 108:

> "The noise is truly the issue. And, you know, we tried to work it out, but I can't agree to hear the noise from eight to five on Saturdays, and some day soon I won't be going to work during the week."

Kim Detrick, who moved to the area in 1992, testified that there were other businesses back there, "but none have produced a fifth of the noise that [she] heard since Mr. Hammond purchased the property." T. 116. She said,

"My concern with Mr. Hammond is that he's going to be running a service garage and, I mean, we all know that's exactly what he going to be doing."

* * *

"We are not trouble-makers. I never complained about anything that was going on that property, and I don't want Mr. Hammond to go bankrupt over this whole thing. But that is my home, and it is annoying to have to sit on my front porch and listen to this constant noise, and I don't see how that can stop.

If Mr. Hammond and Mr. Murphy can come up with a way to limit the noise drastically, I think we would be receptive to that. But I cannot think of a way to do it, and that's where we find ourselves.

I think that the opinion that was handed down in 1988 or '87 couldn't be more clear. That gentleman that wrote that opinion was trying to limit this property to not being a service garage so that the neighbors didn't have to listen to the sound of generators and air compressors and lawnmowers and weedeaters and chain saws being tested out, and that's what I think I am going to be looking forward for the net ten years, or however long I have my property." T. 117-18.

On cross-examination, Ms. Detrick underlined that unless there were "very specific guidelines placed on Hammond, -- I'm not sure he'll do it because --- those two did try to go to him as a neighbor and talk about some concerns that they had, and they weren't addressed, so it does worry me a little bit that, unless specific guidelines are set out for him, that he won't do it." T. 120. She had reviewed guidelines proposed by Mr. Murphy, Hammond's attorney, but found they did not address the noise. T. 121.

Ken Sadofsky, who moved in to the area in 1997, testified to having expressed his objection to Hammond to "running a full scale operation." T. 125. He was not opposed to a "very, very small scale." He concluded,

"But then when I am hearing about the full-time regular use business, then I am concerned about the extent, how far that would go, and how much noise it would create, and that's why I am here in opposition." T. 125.

c. Comparative Analysis

The baseline nonconforming use is a modest country store in operation prior to 1945. There is the later addition of Dold's lawnmower sales and service use, which

Zoning Commissioner Haines approved in 1988 as an intensification at the very time that it was going out of business. Ironically, as it was on its way out, and with no neighborhood opposition to Dold's mild accessory lawnmower use, the ZC Haines did not provide a detailed description of the equipment, products, and vehicles involved, the hours of operation, or noise impact. (He did say that there was no construction or contracting equipment, and that the use was not and could not be an automotive service garage.) There followed a hiatus of almost 15 years before Hammond decided to acquire the property and start his new business. Not surprisingly, the fog of time has produced differing opinions as to the meaning of ZC Haines' opinion and the extent of his approval with respect to lawnmower sales and service. There is added to this the necessity to describe and understand Mr. Hammond's incipient or proposed operation, the nature of any perceived differences between it and the Dold operation, the reasons for neighborhood opposition to the later operation, and the legal significance of such differences. All of this history comes into play against the background of nonconforming use law, and the prohibition of expansion or extension of such uses.

Let us look at Hammond's activities and proposals and put them in perspective. Hammond is a mechanic who came from outside the neighborhood to establish his own new lawnmower dealership for sales and service at a location where none existed for well over a decade. He began to renovate extensively, to build a new engine repair facility for the entire Building B and to place a small showroom in Building C. He used forklifts and front end loaders not previously seen. He did repair work on a large tree-trimming truck, snowblowers, and a piece of commercial equipment. His operation from the start

produced offensive noise not previously experienced in the Dold years. He stated his intention to work on machines of up to 100 horsepower, whereas Dold had worked on 20 horsepower machines. He would have two part-time employees, whereas Dold operated as all in the family. He asserted in writing that there are "no time limitations or restrictions on the continuation of the use of the property" for lawnmower sales and service. On the other hand, he said his equipment, such as the compressors and other tools, would be comparable in horsepower to those used by Dold.

All of this produced new noise impacts offensive to nearby area citizens, both those who lived there during the Dold years, such as Ms. Jung, and newcomers such as Ms. Detrick and Mr. Sadofsky. Mr. Hammond did have supporters, who appreciated his personal help from time to time. But even he seemed to acknowledge some merit to citizen complaints, in that he proposed screening to insulate the site to some extent.

The burden of proof is on the property owner to demonstrate the legitimacy of a nonconforming use. How can it be said that Hammond's actual activities and proposals are comparable to the Dold operation? How can we say that it fits the boundaries of legitimacy set in Jahnigen and McKemy? This record reveals at the very least the "creeping" type of expansion which Phillips disallowed and warned against.

Anderson discusses addition or expansion of facilities in Section 6.47:

> "The addition of new facilities or the enlargement of existing ones seems most likely to be regarded as an extension of use if the nonconforming use is there rendered more incompatible with permitted uses, if the volume or intensity of use is increased, or if the nature of the use is substantially changed."

There are a number of examples of illegal extensions given in footnotes 92-94 in Anderson, of which these are a sample: the erection of poles and lights along a

nonconforming drag strip; construction of a garage to house 18 wheel vehicles in connection with a nonconforming cesspool business; construction of an inspection bay in connection with a nonconforming gasoline station; storage tanks replaced with tanks double the size of old ones; nonconforming tailor shop converted to fully mechanized cleaning and dry-cleaning establishment. On the other hand, the following are given as examples of allowable intensifications: replacement of steam engines with internal combustion engines; addition of a pneumatic tube system by a bank; substitution of a digging machine for the hand digging of sand; installation of a rock crusher at a quarry.

There is no proof that Hammond's new engine repair facility and showroom replicates Dold's facility. The evidence shows a greater adverse impact on the neighborhood. The scale is different. It is not substantially the same use.

Anderson discusses extension to new parts of a building in Sec. 6.48,

> "Where a use was established in part but not all of a building prior to the enactment of a restrictive ordinance, the right to continue the use may not include the right to extend it to other parts of the building."

Citing Phillips, Anderson reports,

> "Some ordinances restrict nonconforming uses to the land or floor space occupied by the use when the restrictive ordinance was adopted."

To be sure, BCZR 104.3 states,

> "No nonconforming building or structure and no nonconforming use of a building, structure or parcel of land shall be extended more than 25% of the ground floor area of the building so used."

There was no proof that Hammond's uses of the entire Buildings B and C squares with the area used by Dold, or limits the increase to 25% of the ground floor area. The record does not show specifically what parts of Buildings B and C were used by the Dold

operation. The 1988 site plan simply shows an outline of these buildings. There are various indications in the 1988 opinion and in the testimony that Building B was used by Dold for sales and service, but there is no specific identification of an area used by Dold as a "repair facility" comparable to that proposed by Hammond. As to Building C, the 1988 ZC opinion indicates that Dold used it for storage, but not for a showroom.

Anderson sequentially observes, with respect to new activity, produce, or service, in Section 6.49:

> "The right to continue a nonconforming use does not include the right to expand it through the addition of a new product or service."

Footnotes 17-21 reflect the care with which courts examine introduction of new products, processes, and services in order to guard against a change in the character of the use.

In this light, what conclusions can fairly be asserted on this historic record? Hammond took ZC Haines' 1988 approval of Dold's lawnmower sales and service use as a virtual *carte blanche* to use the property without restriction as to facilities, equipment, area, products, and hours, so long as he could call it by the name "lawnmower sales and service." He construed it to his own advantage as an unbounded permission, along with a letter from Zoning staff member Lloyd Moxley which merely quoted the decision. Unfortunately, Hammond did not appreciate the limitations and boundaries set by nonconforming use law, of which there is ample indication in ZC Haines' 1988 opinion.

He began renovations and startup operations in such a way as to alarm neighbors immediately. The neighbors had legitimate concerns that Hammond, by his acts and stated intent, had begun to implement an expansion of the original nonconforming use,

something much different in character than the Dold operation. If not for this litigation, there is the potential, if not the probability, that the use will become even more offensive than the record already reveals. Moreover, this is not a mere byproduct of intensification or increased volume.

IX. Hammond II: The Tale of Two County Board of Appeals Opinions

It is an understatement to say that the **Hammond II** majority opinion is a disappointment, as well as legally insufficient. The majority did not identify with specificity either the use approved in 1988 or the current Hammond use. There was no discussion of the history. There was no discussion of the testimony. There was no discussion of the new equipment or facilities. There was no discussion of the essential disappearance of the country store or its transformation into a machine shop. There was no realistic comparative analysis. To be sure, the majority concluded that the Hammond use is the "same today" as the originally approved use, but it will be readily seen that this is stated as a bald conclusion.

The majority referred to the CSA remand opinion, and discussed selectively the case law on "intensification," well into page 4. Then, without any description or analysis of the specific facts, the history, the eyewitness observations, or anything else probative of the original use or Hammond's use, the majority launched into a series of conclusions.

It wrote that the lawnmower sales and service use today is "unchanged" and "the same today as it was allowed and made a part of the originally approved nonconforming use store." Then, it imposed a set of conditions to address the "needs and concerns of the

surrounding community." The majority may have viewed this as a Solomonic compromise. Unfortunately, it spawned another round of judicial review.

Here is what passes for the CBA majority's findings of fact and conclusions of law, at pages 4-6,

> "The majority therefore finds that the sales and service of lawnmowers and related equipment in and of itself is not a nonconforming use, but rather is included in the previously and continuing to exist nonconforming use country store. For reasons stated by the Court of Appeals in its most recent decision, both sales and services are not limited to items purchased only at the subject location.
>
> We find that the central nature and character of the current use of lawnmower sales and service is unchanged and is the same today as it was allowed and made a part of the originally approved nonconforming use store. It is in no way different today than then.
>
> As the cited case law supports, neither an increase in quantity, physical structure, or frequency (Feldstein) nor an increase in volume of business (County Council of Prince George's County v. Gardner), will render such activity as in the instant case an enlargement rather than an intensification of a nonconforming use. The structure and volume of Petitioner's request is not an alternation of activity from the original incarnatior; rather it simply reflects the natural evolution of these types of services through the intervening years for the sales and service of lawnmowers provided in the originally approved nonconforming use to those same services provided in today's more advanced technological and use market.
>
> Turning finally to the four part criteria contained in McKemy, Supra., the majority finds that the current requested use does in fact reflect the nature and purpose of "lawnmower sales and service" contained in the original nonconforming use; that it is the same manner of service provided as to lawnmowers and related equipment previously provided; that, under the case law the current use in no way can be determined to be a "drastic enlargement" of services previously provided.
>
> As to the fourth criteria, the majority is mindful of the needs and concerns of the surrounding community wishing to maintain their esthetic quality of life. While the majority holds that that "nature" of the effect of the requested use is not substantially different of that of its earlier level, we believe that certain restrictions should be places upon the Petitioner's use to insure that any effect at all conceivable will be a meliorated. Those conditions are:
>
> a. That sales and service of lawnmowers and related equipment are to be limited to those items utilized by homeowners only. No sales and service of equipment of a commercial nature will be permitted.

b. That a small trailer, capable of transporting two pieces of permitted equipment will be allowed to be operated by Petitioner for the transportation of the equipment sold and serviced at the location. Moreover, a small forklift will be permitted and limited to the loading and unloading of the trailer. Both the trailer and the small forklift will be stored at the rear of the property in order to remain as unobtrusive as possible.

c. The repair shop must be located at the extreme back of the property.

d. No repair of motor vehicles of any description will be allowed.

e. The related equipment permissible on the property for sales and service purposes will include lawnmowers, tiller, chippers, and like items. The repair of equipment, as well as its transportation, loading or unloading, shall take place only Monday through Friday from 9:00 a.m. to 6:00 p.m. Petitioner may maintain business hours on the weekends as desired by him, but in no event shall loading, offloading, or any repairs be carried our on Saturday or Sunday."

These findings are no better than the findings deemed insufficient in United Steelworkers, Preston, and Bucktail. The seductive use of the phrase "natural evolution," moreover, is but a disguise for the "creeping process" which the Court disapproved in the Phillips case. Indeed, the word "evolution" refers to change in form, usually to a more complex form. It may refer to morphological and physiological changes in species. If translated to the zoning world, the word "evolution" does not equate to "intensification." It actually equates to "extension." The law of nonconforming uses does not tolerate or accept technological evolution where the effect is to transform the use. To illustrate, a nonconforming business for the trading and supplying of horses could not justify survival as an automobile dealership on the basis of "natural evolution."

The majority implicitly recognized the problematic nature of its conclusions when by imposing conditions on the use. If the Hammond use were truly the same as the use approved in 1988, there would be no need for conditions. The CBA majority in effect

admitted Hammond exceeded the boundaries of the original use. In other words, the finding that Hammond's use could not legitimately go forward without conditions negates the proposition that the new use is just a continuation of the original use. But the majority decided to search for a compromise. This avoided the necessity to take the facts and proceed logically to the required conclusion of law and to terminate the use.

Margaret Brassil's dissent, on the other hand, recited detailed findings of fact, analysis, and supportable conclusions of law. It began with an insightful discussion of the problem of reintroduction of a business use after many years. Consistent with the CSA remand instructions, she found unacceptable Hammond's argument that "reintroduction of a permitted intensification use should be automatic ...." She observed,

> "However, this case itself is a clear example of why that argument should not be accepted. For 17 years, the residents of this area (which is all residentially zoned RC-4) have lived next to a quiet, an obtrusive Country Store and Antique Shop. The reintroduction of a lawn mower business, after so many years, is quite a change. It's a truism that time changes all things: Neighborhoods change, property values change, even people's tolerance for noise changes. The reintroduction of a once-permitted intensification should require the same scrutiny that the original permission required."

Accordingly, she echoed Judge Hollander in framing the problem,

> "A hearing should be necessary to determine the very heart of the matter regarding nonconforming uses: whether the proposed use is a change in use or whether it is an expansion beyond what the law says is permissible."

Panel member Brassil then did the necessary analysis. She did go to the heart of the matter when she wrote,

> While the Haines decision clearly places the lawn mower business as subsidiary to the Country Store, Mr. Hammond's proposal seems to make the country store subsidiary to the lawnmower business. In his testimony, Mr. Hammond stated that his "primary purpose was to sell and service lawnmowers. That was my intent.... I also collect antique lawn tractors, small lawnmowers, and Gravely was one of the tractors I collect and I want to be a dealership for them." (Transcript, pages 28-29). When asked specifically what he proposed to do on the property, Mr. Hammond replied: "I propose to

have a lawnmower sales and service operation selling Gravely, Hyondai (phonetic), steel..." (Transcript page 38).

In his brief, Mr. Hammond also states that he has been unable to "start his business" as though the lawn mower sales and services were the primary business. Mr. Hammond owns the Country Store, and that has continued operation throughout these appeals and proceedings.

Second, in his order, Haines granted approval to: "a Country Store, with Food and Grocery sales and Deli operation, Household hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for Sale, not including contractors or construction companies, landscaping or trucking operation or an automobile service garage, *as indicated on Petitioner's Exhibit 1, which shall become the final development plan and final site plan"* (Italics added). It is, therefore, necessary to compare the development plan and site plan from 1988 with the current proposal in deciding whether the proposal passes McKemy's criteria, and the *Gardiner* distinction.

In his testimony, Mr. Hammond stated that his lawnmower business would be in Buildings B and C, and lawnmowers awaiting repair would be stored in the covered area in front of one of the buildings and a fenced area behind them (Petitioner's Exhibit 8). He further stated that he proposed to use Building B for repair work and turn Building C into a showroom for new equipment. Mr. Dold, who operated the Country Store at the time the Haines decision was made, testified that his lawn mower business was only in Building B on the plat (Petitioner 's Exhibit 8). In his opinion, Zoning Commissioner Haines' Opinion states that Building C "is and will remain a storage building." Mr. Hammond's proposal to turn this building into a for new equipment is, therefore, a completely new use compared to the use Haines allowed (Transcript p. 46).

This new use and the change in relationship between the country store and the lawnmower business are what make Mr. Hammond's proposal an impermissible expansion of the Country Store. He seems to be converting the nonconforming use into a lawnmower business. He is using more space, by turning Building C into a showroom, than Mr. Dold had used. The proposed use, therefore, fails three of the four *McKemy* criteria and the *Gardiner* distinction. It is not just an increase in volume of an already existing business, but is attempting to be a new and different business. Its potential negative impact on the community is reflected in my colleagues' attempts to place restraints on the business. A country store in a residential area is one thing. A machine shop is another. This proposal seems to be for a machine shop, which is a wholly new use and therefore, impermissible."

This dissenting opinion is more than legally supportable. It comes to the only legally supportable conclusion on this record.

This dissenting opinion reflects that the material facts reveal a change in the nonconforming use, and a very major one at that. As a result, the original country store use is no more. It has terminated. Moreover, once a nonconforming use terminates, it cannot be revived. History cannot go backwards. That is the lesson of the recent Purich decision. There is no justification for a further remand. The Circuit Court should reverse the County Board of Appeals and instruct it to issue an order which denies the Petition for Special Hearing and declares the nonconforming use to be terminated.

As a postscript, we add this final footnote about the conditions imposed by the majority. Hammond may argue for the deletion of the problematic conditions. This should be rejected out of hand. The inclusion of problematic conditions is never a reason, excuse or justification for a court to delete the conditions and leave standing an unconditional approval. This would be a usurpation of the administrative function. O'Donnell v. Bassler 289 Md. 501, 508-15 (1981). Usually, as Judge Rita Davidson explained in O'Donnell, the imposition of invalid conditions would warrant a remand so that the agency could perform its administrative function correctly. In the present case, however, as we have shown, the CBA's decision to impose conditions is further confirmation that Hammond's use has exceeds the legitimate boundaries of the original nonconforming use and has caused the termination of the nonconforming use.

Conclusion

For the foregoing reasons, the Circuit Court should reverse and vacate the County Board of Appeals order dated September 28, 2006, and order the CBA to enter an order denying the Petition for Special Hearing and to declare the nonconforming use at 11942

and 11950 Falls Road for a country store and accessory lawnmower sales and service hereby terminated. There is no need for further proceedings. It is time to close this case.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio/rmw

CAROLE S. DEMILIO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of January, 2007, a copy of the foregoing People's Counsel for Baltimore County's Memorandum was mailed first class mailed, postage prepaid to Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030 and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, Attorney for Petitioner.

Peter Max Zimmerman

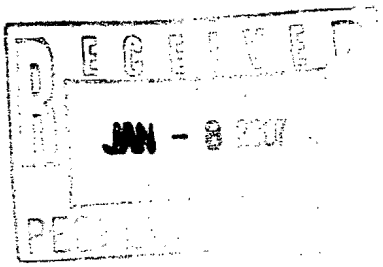
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

1/8/07

PM2

PETITION OF BARBARA JUNG, PRO SE
11939 FALLS ROAD
COCKEYSVILLE, MD. 21030

* IN THE



FOR JUDICIAL REVIEWOF THE DECISION
OF THE COUNTY BOARD OF APPEALS
FOR BALTIMORE COUNTY
Old Courthouse, Room 47,
400 Washington Ave.
Towson, Md. 21204

* CIRCUIT COURT

* FOR

IN THE MATTER OF THE APPLICATION
OF JAMES G. HAMMOND FOR A SPECIAL
HEARING for the property located on the W/S
Of Falls Road, 2200' N of Broadway Road
(11942 & 11950 Falls Road 8th Election
District, 3rd Councilmanic District)

* BALTIMORE COUNTY

Case No. 03-366 SPH before the County
Board of Appeals for Baltimore County

* Civil no. 03-C-06-011166

* * * *

BARBARA JUNG'S, PRO SE, MEMORANDUM

INTRODUCTION

My home for the past 24 years is located directly across Falls Road from the Hammond property. I have represented myself in every stage of this proceeding for the past 4 years. The People's Counsel is involved and has filed a Memorandum in this case. I will defer to his expertise in this area of the law. However I feel compelled to attempt to persuade this Honorable Court to reverse the Majority opinion of the Board of Appeals and to affirm the Dissenting opinion.

ISSUE

This case is before this Honorable Court on appeal from a split decision of the Board of Appeals. The Board was ordered by the Court of Special Appeals to answer two questions on remand. The first is whether the lawn mower business, as proposed by the present

owner, James Hammond, is a lawful intensification of the non-conforming use; the second question is whether an intensification of a non-conforming use may be abandoned when the original non-conforming use has not been abandoned. (pg. 44 Court of Special Appeals opinion).

FACTS

The original non-conforming use is a Country Store located in a residential neighborhood on Falls Road. The store has been in existence since 1915 and therefore is a lawful non-conforming use, having been in existence when zoning regulations came into existence in 1945. (Court of Special Appeals opinion pg. 7) In 1972, the then owner of the Country store, Robert Dold, began to repair lawn equipment on the property. (Court of Special Appeals opinion pg. 7) He testified before the original Board of Appeals Panel on June 25, 2003 that "we sold and repaired lawn mowers, chain saws, weed eaters, blowers and different types of **homeowner's** (emphasis added) equipment. (transcript pg. 77 line 17-18). He further testified at a prior hearing in front of the Deputy Zoning Commissioner that he worked on engines up to 25 horsepower (transcript pg. 61 line 10-12). In 1988, when Mr. Dold was considering leasing the property, he applied for a Special Hearing to clarify the permissible use of the property. As a result, the then Deputy Zoning Commissioner Haines issued an Opinion that held the use by Mr. Dold as a mower repair facility was then a lawful intensification.

It is uncontradicted that in 1986 or 1987 the use as a lawn mower repair facility lapsed (transcript pg 80 line 15-19) and that thereafter, the rear building on the site was used for other purposes, including an antique shop (transcript pg.111 line 1-4) while the front building continued to be operated as a Country Store.

James Hammond purchased the property in 2002 with the "primary purpose was to sell and service lawn mowers. (transcript pg. 28 line 19-20) His primary purpose was not to operate the General Store, which was the original non-conforming use. He testified that he intends to work on engines up to 100 horsepower (transcript pg 61 line 6-9), that he will operate from 7:00 a.m. until 6:00 p.m. Monday through Saturday (transcript pg. 55 line 7-12), that he intends to use a forklift to unload equipment (transcript pg. 28 line 17-20) and a front end loader on the property. (transcript pg. 56 line 2-6)

He admitted that he stores 2 or 3 of his personal cars on the property (transcript pg. 60 line 4-8), that he stores his personal commercial grade wood chipper on the property. (transcript pg. 58 line 1-2) and that in the fall/ winter of 2002-2003, he stored a commercial tree trimming truck on the property for one month while he repaired it. (transcript pg. 57-58) He also testified that he intends to store on the property a trailer that can haul 5 or 6 tractors for pick up and deliveries (transcript pg 56 line 7-11). Mr. Hammond has maintained throughout that he will service commercial, as well as home-owner equipment. A fair reading of his testimony is that his main purpose is to service commercial equipment.

Judge Hollander, on page 46 of the Opinion of the Court of Special Appeals conceded that even if we agree with appellant's construction of the Haines' decision, we hasten to add that it is not at all clear that the business that was the subject of the Haines' decision is,

indeed, identical to the appellant's proposed business. In deciding whether the Haines' decision is entitled to preclusive effect, that issue looms large."

THE BOARD OF APPEALS OPINION

The Majority Opinion held that "the majority therefore finds that the sales and service of lawn mowers and related equipment in and of itself is not a nonconforming use, but is included in the previously and continuing to exist nonconforming use country store. (Board of Appeals Majority Opinion pg. 4) They further found that Mr. Hammond's proposed use is a lawful intensification as opposed to an unlawful extension of the nonconforming use. They then proceeded to place restriction on the use.

The Majority Opinion did not address the second question of whether a lawful intensification can be abandoned by non-use between 1987 and 2002.

The Dissenting Opinion found that Mr. Hammond's proposed use is an unlawful expansion of the non-conforming use and that a lawful intensification can be abandoned by non-use.

DISCUSSION

The Majority Opinion of the Board of Appeals is not supported by the law or the facts. Judge Hollander, speaking for the Court of Special Appeals, discussed the complicated area of non-conforming uses in zoning law. Judge Hollander stated that "there is a strong legislative and judicial disinclination in Maryland and elsewhere to permit the expansion of non-conforming uses" (Opinion pg. 38) and that "non-conforming uses are discouraged by law as inherently incompatible with permitted uses..." (Opinion pg. 38) Judge Hollander also held that it is Mr. Hammond's burden of proof to show that his proposed use is a lawful intensification as opposed to an unlawful enlargement of the non-conforming use. (Opinion pg. 39) Judge Hollander then very clearly cited the Maryland law concerning intensification versus enlargement of non-conforming uses and remanded the case back to the Board of Appeals.

The People's Counsel, in his Memorandum, discusses all areas of non-conforming uses, including lawful intensification, unlawful enlargement and abandonment. I will defer to his recitation of the applicable law.

In order to make the decision of whether a proposed use is an intensification or an enlargement the trier of fact is required to apply the facts to the law. When comparing the use by Robert Dold between 1972 and 1987 with the proposed use by Mr. Hammond, it is abundantly clear that it is an unlawful enlargement of the non-conforming use. See the chart below.

DOLD USE	HAMMOND USE
• 25 horsepower home-owner mowers	vs. 100 horsepower commercial grade equipment
• trailer for 2 mowers	vs. trailer for 5 or 6 mowers
• no forklifts and front end loaders	vs. forklift and front-end loader
• no evidence of hours of operation	vs. engine work from 7a.m.-6p.m. Monday through Saturday
• no evidence that property used as storage lot	vs. storage of vehicles and personal commercial grade equipment

The evidence clearly shows that the proposed use is a change from a small, home-owner oriented repair shop, as an accessory use to the Country store, to a large, commercial operation, with the Country store being the accessory use, and thus is an unlawful expansion. Such a use has no place in a residential neighborhood on Falls Road. The Majority Opinion, after finding the use to be a lawful intensification, restricts the use. Although as a neighbor, I appreciate those restrictions, it is further evidence that the proposed use has no place in the neighborhood and that the majority recognized that Mr. Hammond, if given an inch will take a mile. It is because of the restrictions that Mr. Hammond filed the present appeal. If he were truly interested in continuing the Dold use, the Majority Opinion would have been a victory for him and he would not have filed the present appeal. I agree with the People's Counsel's argument, page 6 of his Memorandum, that the Majority's restrictions on Mr. Hammond's use is "equivalent to an admission that the Petitioner's use effectively exceeds the legitimate boundaries of the original non-conforming use." He continued, at page 29, " If the Hammond use were truly the same as the use approved in 1988, there would be no need for the restrictions." Additionally, the Majority Opinion is silent on the effect of the change is use of the property from 1987 until 2002. The undisputed evidence is that the use was changed to a use that had nothing to do with engine repairs. The argument that a lawful intensification can be re-established after 17 years of non-use is not supported by any case law and flies in the face of the body of law that holds that non-conforming uses are not favored.

Therefore, this Court should vacate the Majority Opinion of the Board.

The Dissenting Opinion is supported by the law and the facts. The Dissenting Opinion recounts the facts and compares the proposed Hammond use with the known Dold use. Margaret Brassil found that it is not within the spirit and intent of zoning laws regarding non-conforming uses to allow the automatic reintroduction of a permitted intensification when the use has been abandoned for 17 years. Doctor Brassil also found that the proposed use is an unlawful enlargement of the original non-conforming use, noting that the focus of the intended use would change from a Country Store with mower repairs as an accessory use to the focus being the repair shop with the country store being the accessory use. Doctor Brassil additionally found that the use proposed by Mr. Hammond was expanded from one building to two buildings. Commenting on the Majority's attempt to place restrictions on the use, Doctor Brassil stated

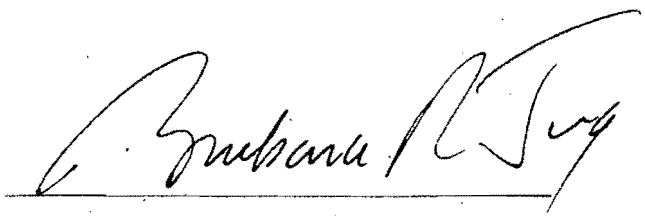
"that it is necessary to put such restrictions on the proposed business seems, to me, to be one indication that Hammond's proposal would adversely impact the surrounding area". The Opinion closes with 'it is not just an increase in volume of an already existing business, but is attempting to be a new and different business. Its potential negative impact on the community is reflected in my colleagues' attempts to place restraints on the business. A country store in a residential neighborhood is one thing. A machine shop is another. This proposal seems to be for a machine shop, which is a wholly new use and therefore, impermissible."

The Dissenting Opinion is supported by the law and the facts and should be affirmed.

CONCLUSION

It is inconceivable to me as a neighbor of the Hammond property that after 17 years of non-use as a lawn mower repair shop, that Baltimore County would allow Mr. Hammond to open a commercial lawn mower machine shop in this residential community. It is clearly an unlawful enlargement of the Dold operation. In addition, the use as a repair shop was abandoned for 17 years. Is it fair for neighbors who moved into the area to have foisted upon them a machine shop when they had no idea such a use was allowed? Is it fair to the neighbors who have lived in the neighborhood from the time of the Dold repair shop to have imposed on them after 17 years a commercial operation, with 100 horsepower motors being repaired from 7 a.m. until 6 p.m. Monday through Saturday, with fork lifts and front end loaders?

I respectfully urge this Honorable Court to reverse and vacate the Majority Opinion and adopt and affirm the Dissenting Opinion.



Barbara R. Jung, Pro Se
11939 Falls Road
Cockeysville, Maryland 21030

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of January 2007, a copy of the foregoing Barbara Jung's Memorandum was mailed first class to John C. Murphy, Esq., 516 N. Charles Street, Suite 206, Baltimore, Md. 21201, Attorney for the Petitioner and to Peter Max

Zimmerman, Esq., People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Md. 21204.

Barbara R. Jung

Barbara R. Jung, Pro Se

IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND PETITIONER/LEGAL OWNER FOR A SPECIAL HEARING OF PROPERTY LOCATED ON THE W/S OF FALLS ROAD 2,200 FEET NORTH BROADWAY ROAD (11942 & 11950 FALLS ROAD)	*	ON REMAND FROM THE FOR CIRCUIT COURT FOR BALTIMORE COUNTY
8TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT CASE NO.: 03-366-SPH	*	Civil Action No. C-03-12458

* * * * * * * * * * * * *

ORDER OF REMAND BY ORDER OF THE CIRCUIT COURT FOR BALTIMORE COUNTY PURSUANT TO ORDER OF THE MARYLAND COURT OF SPECIAL APPEALS

This matter comes before the Board of Appeals as a result of a remand from the Court of Special Appeals of Maryland, Sept. Term 2004, Case No. 00980 (unreported - dated Nov. 15, 2005) (hereinafter referred to as *Hammond*) arising from an appeal of the Board's decision in the above matter dated October 17, 2003. The case was originally heard before Board members Stahl, Worrall, and Marks. Several terms having expired, proceedings subsequent to the remand were heard by members Stahl, Brassil, and Crizer.

We will not here repeat the entire factual presentations of the parties below. We address ourselves solely to the directions of the Court of Special Appeals upon its remand.

The Appellate Court determined that the finding by the original Board that the subject lawnmower business was itself a nonconforming use was erroneous, and therefore formed an inappropriate basis for a decision based upon that determination that the lawnmower "nonconforming use" had lapsed. The decision of the Board was vacated. The Court explained, "the Board's erroneous determination that the lawnmower business was a nonconforming use is

IN THE MATTER OF THE APPLICATION OF	*	ON REMAND
JAMES G. HAMMOND	*	FROM THE
PETITIONER/LEGAL OWNER FOR A SPECIAL HEARING OF	*	FOR
PROPERTY LOCATED ON THE W/S OF FALLS ROAD 2,200 FEET NORTH BROADWAY ROAD	*	CIRCUIT COURT FOR
(11942 & 11950 FALLS ROAD)	*	BALTIMORE COUNTY
	*	Civil Action
8TH ELECTION DISTRICT		No. C-03-12458
3RD COUNCILMANIC DISTRICT	*	
CASE NO.: 03-366-SPH		

* * * * * * * * * * * *

DISSENTING OPINION ON REMAND

I respectfully dissent from the majority opinion of the County Board of Appeals in this case. The majority believe that proposed use of the subject site is similar enough to the permissible intensification approved in 1988 to allow it. I looked at the evidence and the law and argue that the proposed use is different, that it departs from the original use in spirit, intent and function, and that it has a significant impact on the surrounding area as to cause it to be an impermissible expansion.

In her opinion remanding this case back to the Circuit Court for Baltimore County for remand to the Board of Appeals, Court of Special Appeals Judge Eileen Hollander charged the Board with determining "whether the lawn mower business is a lawful intensification of the original nonconforming use. Put another way, the question is whether an intensification may be abandoned when the original nonconforming use has not been abandoned." (Hollander opinion, p. 44) Judge Hollander thus poses two separate questions for the Board to now consider. I will address these questions in inverse order.

1. May an intensification be abandoned when the original nonconforming use has not been abandoned?

12/7/06

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

PETITION OF: *
JAMES G. HAMMOND
Legal Owner
11942 & 11950 Falls Road *
Cockeysville, MD 21030

*

And *

PETITION OF: *
PEOPLE'S COUNCIL FOR
BALTIMORE COUNTY
400 Washington Ave. *
Old Courthouse – Room 47
Towson, MD 21204 *

FOR JUDICIAL REVIEW OF THE OPINION * CIVIL ACTION
OF THE COUNTY BOARD OF APPEALS No. **3-C-06-11166**
OF BALTIMORE COUNTY *
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE *
TOWSON, MARYLAND 21204

*

IN THE MATTER OF *
JAMES G. HAMMOND
Legal Owner
11942 & 11950 Falls Road *
Cockeysville, MD 21030

*

8th ELECTION DISTRICT *
3rd COUNCILMANIC DISTRICT

BOA CASE NO.: 03-366-SPH

*

* * * * * * * * * * * * *

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

RECEIVED AND FILED
06 DEC -7 AM 11:42
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

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 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

January 8, 2004	Initial Record of Proceedings filed with the Circuit Court for Baltimore County - **03-C-03-012458**. **(Copy attach and all previous records are returned herewith)**
January 31, 2006	Order of The Honorable John O. Hennegan of the Circuit Court for Baltimore County *REMANDING* this matter back to the Board of Appeals for further proceedings consistent with Judge Hollander's November 15, 2005 Unreported Opinion.
February 27, 2006	Letter from Mr. Murphy via fax with accompanying agreement between the parties and a proposed Order; stipulation to be presented to the Board at the hearing on February 28, 2006, along with the original proposed Order.
February 28, 2006	Board of Appeal convened for hearing; concluded argument this date; Counsel for Petitioner and Protestant, Ms. Jung, presented proposed Order and agreement. NO EXHIBITS
March 29, 2006	Memorandum filed by John C. Murphy, Esq., on behalf of James G. Hammond, Petitioner. People's Counsel's Second Remand Memorandum, Post-Hearing, filed by the Office of People's Counsel. Respondent's Memorandum filed by Barbara R. Jung, *pro se*.
May 2, 2006	Board of Appeals convened for Public Deliberation. Majority decision reached by the Board that the use is a legal expansion of the nonconforming use; to be approve with certain restrictions. Dr. Brassil, will write a Dissenting Opinion on Remand as she did not agree with the imposition of the restrictions, as she believed that this matter was more in

keeping with a special exception.

September 28, 2006	Board issued its Order of Remand by Order of the Circuit Court for Baltimore County Pursuant to Order of the Maryland Court of Special Appeals, along with a Dissenting Opinion and Order on Remand.
October 25, 2006	Board of Appeals received notification from the Circuit Court for Baltimore County that an appeal had been taken in this matter by John C. Murphy, Esq. on behalf of James G. Hammond.
November 6, 2006	Certificate of Mailing filed with the Circuit Court, and mailed to all interested parties, in response to John C. Murphy, Esq.'s appeal on behalf of James G. Hammond.
	Response to Petition for Judicial Review by People's Counsel.
	Cross-Petition for Judicial Review filed by People's Counsel.
November 16, 2006	Second Certificate of Notice filed with the Circuit Court, and sent to all interested parties, in response to the request for Petition for Judicial Review filed by People's Counsel.
December 6, 2006	Transcript of Proceedings filed.
December 7, 2006	Record of Proceedings filed in the Circuit Court for Baltimore County, Maryland

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

Linda B. Fliegel

Linda B. Fliegel, Legal Secretary
County Board of Appeals, Room 49
Old Courthouse, 400 Washington Avenue
Towson, MD 21204 (410-887-3180)

I HEREBY CERTIFY that on this 7th day of December, 2006, a copy of the foregoing Certificate of Notice has been mailed to: John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, James G. Hammond, 1517 Applecroft Lane, Cockeysville, MD 21030, Barbara Jung, 11939 Falls Road, Cockeysville,

MD 21030, Kim Detrick, 11941 Falls Road, Cockeysville, MD 21030, Ken Sadofsky, 11944 Falls Road, Cockeysville, MD 21030, Peter Max Zimmerman, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Linda B. Fliegel

Linda B. Fliegel, Legal Secretary
County Board of Appeals, Room 49
Old Courthouse, 400 Washington Avenue
Towson, MD 21204 (410-887-3180)

11/16/06

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
PETITION OF: PEOPLE'S COUNSEL FOR BALTIMORE COUNTY OLE COURTHOUSE – ROOM 47 400 WASHINGTON AVENUE TOWSON, MD 21204	*	
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	*	CIVIL ACTION NO.: 03-C-06-11166
IN THE MATTER OF: JAMES G. HAMMOND FOR SPECIAL HEARING FOR PROPERTY LOCATED ON THE W/S OF FALLS ROAD, 2,200' N OF BROADWAY ROAD (11942 & 11950 FALLS ROAD)	*	
8TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT	*	
CASE NOS: 03-366-SPH	*	

* * * * * * * * * * * *

SECOND CERTIFICATE OF NOTICE

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:

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

RECEIVED AND FILED
06 NOV 16 AM 11:07
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

John C. Murphy , Esquire
516 N. Charles Street, Suite 206, Baltimore, MD 21201

James G. Hammond
1517 Applecroft Lane, Cockeysville, MD 21030

Barbara Jung
11939 Falls Road, Cockeysville, MD 21030

Kim Detrick
11941 Falls Road, Cockeysville, MD 21030

Ken Sadofsky
11944 Falls Road, Cockeysville, MD 21030

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

Linda B. Fliegel

Linda B. Fliegel, Legal Secretary
County Board of Appeals, Room 49
Old Courthouse, 400 Washington Avenue
Towson, MD 21204 (410-887-3180)

I HEREBY CERTIFY that on this 16th day of November, 2006, a copy of the foregoing Second Certificate of Notice has been mailed to: John C. Murphy , Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, James G. Hammond, 1517 Applecroft Lane, Cockeysville, MD 21030, Barbara Jung, 11939 Falls Road, Cockeysville, MD 21030, Kim Detrick, 11941 Falls Road, Cockeysville, MD 21030, Ken Sadofsky, 11944 Falls Road, Cockeysville, MD 21030, Peter Max Zimmerman, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Linda B. Fliegel

Linda B. Fliegel, 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

November 6, 2006

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

RE: Circuit Court Civil Action No. 03-C-06-11166
Petition for Judicial Review
James G. Hammond
Board of Appeals Case No.: 03-366-SPH

Dear Mr. Zimmerman:

In accordance with the Maryland Rules, the County Board of Appeals is required to submit the record of proceedings of the *Second* 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 and must be paid in time to submit same to the Circuit Court within the sixty day timeframe, as stated in the Maryland Rules.

The Court Reporter that you need to contact to obtain the transcript and make arrangement for payment is as follows:

CAROLYN PEATT
TELEPHONE: 410- 486-8209
HEARING DATE: February 28, 2006 (On Remand from CSA)

This office has also notified Ms. Peatt that a transcript on the above captioned matter is due by December 7, 2006, for filing in the Circuit Court. A copy of your *Second* Petition, which includes your telephone number, has been provided to the Court Reporter, which enables her to contact you for payment provisions.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Linda B. Fliegel
Legal Secretary

/lbf
Enclosure

c: Carolyn Peatt, Court Reporter
Peter M. Zimmerman, Esq.
James G. Hammond

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on Recycled Paper

County Board of Appeals of Baltimore County

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

November 16, 2006

James G. Hammond
1517 Applecroft Lane
Cockeysville, MD 21030

RE: Circuit Court Civil Action No. 03-C-06-011166
Petition for Judicial Review
James G. Hammond
Board of Appeals Case No.: 03-366-SPH

Dear Mr. Hammond:

Notice is hereby given, in accordance with the Maryland Rules, that a *Second* Petition for Judicial Review was filed on November 6, 2006, 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. 03-C-06-1116.**

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Linda B. Fliegel
Legal Secretary

/lbf
Enclosure

Clerk of the Court/Former Civil Action #03-C-12458
John C. Murphy
Peter Max Zimmerman, Esquire
William J. Wiseman, III, Zoning Commissioner
Timothy M. Kotroco, Director/PDM
Barbara Jung
Kim Detrick
Ken Sadofsky

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11/6/06

PETITION OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	FOR
IN THE MATTER OF THE APPLICATION OF **JAMES G. HAMMOND** FOR A SPECIAL HEARING for property located on the W/S of Falls Road, 2,200' N of Broadway Road (11942 & 11950 Falls Road) 8th Election District, 3rd Councilmanic District	*	BALTIMORE COUNTY
	*	Civil No. 03-C-06-011166
Case No. 03-366-SPH before the County Board of Appeals of Baltimore County	*	

* * * * * * * * * * * * * *

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06 NOV -6 AM 8:03
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY, MD

CROSS-PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY hereby requests judicial review of the Opinion by the County Board of Appeals dated September 28, 2006 in the above case. PEOPLE'S COUNSEL was a party to the proceeding before the County Board of Appeals of Baltimore County in this matter.

This Cross-Petition is filed pursuant to Rules 7-202 and 7-203(b) of the Maryland Rules of Procedure.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio/RMW

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

RECEIVED
NOV 06 2006
BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th of November, 2006, a copy of the foregoing Cross-Petition for Judicial Review was mailed to Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030 and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, Attorney for Petitioner.

Peter Max Zimmerman

PETER MAX ZIMMERMAN

11/6/06

PETITION OF PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204	*	FOR
	*	
IN THE MATTER OF THE APPLICATION OF **JAMES G. HAMMOND** FOR A SPECIAL HEARING for property located on the W/S of Falls Road, 2,200' N of Broadway Road (11942 & 11950 Falls Road) 8th Election District, 3rd Councilmanic District	*	BALTIMORE COUNTY *
	*	Civil No. 03-C-06-011166
Case No. 03-366-SPH before the County Board of Appeals of Baltimore County	*	

* * * * * * * * * * * * *

RESPONSE TO PETITION FOR JUDICIAL REVIEW

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY, in accordance with Maryland Rule 7-204, submits this response to the Petition for Judicial Review filed JAMES G. HAMMOND, and states that it intends to participate in this action for Judicial Review. The undersigned participated in the proceeding before the County Board of Appeals.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio /RMW

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

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'06 NOV -6 AM 10:03
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

RECEIVED
NOV 06 2006
BALTIMORE COUNTY
BOARD OF APPEALS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th of November, 2006, a copy of the foregoing Response to Petition for Judicial Review was mailed to Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030 and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, Attorney for Petitioner.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

11/6/06

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY
*
PETITION OF:
JAMES G. HAMMOND *
Legal Owner
11942 & 11950 Falls Road *
Cockeysville, MD 21030
*
FOR JUDICIAL REVIEW OF THE OPINION * CIVIL ACTION
OF THE COUNTY BOARD OF APPEALS No. **3-C-06-011166**
OF BALTIMORE COUNTY *
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE *
TOWSON, MARYLAND 21204
*
IN THE MATTER OF
JAMES G. HAMMOND *
Legal Owner
11942 & 11950 Falls Road *
Cockeysville, MD 21030
*
8th ELECTION DISTRICT *
3rd COUNCILMANIC DISTRICT
*
CASE NO.: 03-366-SPH
* * * * * * * * * * * * *

CERTIFICATE OF NOTICE

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:

John C. Murphy, Esquire
516 N. Charles Street, Suite 206, Baltimore, MD 21201

RECEIVED AND FILED
'06 NOV -6 AM 9:20
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

James G. Hammond
1517 Applecroft Lane, Cockeysville, MD 21030

Barbara Jung
11939 Falls Road, Cockeysville, MD 21030

Kim Detrick
11941 Falls Road, Cockeysville, MD 21030

Ken Sadofsky
11944 Falls Road, Cockeysville, MD 21030

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.

Linda B. Fliegel

Linda B. Fliegel, Legal Secretary
County Board of Appeals, Room 49
Old Courthouse, 400 Washington Avenue
Towson, MD 21204 (410-887-3180)

I HEREBY CERTIFY that on this 6th day of November, 2006, a copy of the foregoing Certificate of Notice has been mailed to: John C. Murphy , Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201, James G. Hammond, 1517 Applecroft Lane, Cockeysville, MD 21030, Barbara Jung, 11939 Falls Road, Cockeysville, MD 21030, Kim Detrick, 11941 Falls Road, Cockeysville, MD 21030, Ken Sadofsky, 11944 Falls Road, Cockeysville, MD 21030, Peter Max Zimmerman, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Linda B. Fliegel

Linda B. Fliegel, 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

November 6, 2006

James G. Hammond
1517 Applecroft Lane
Cockeysville, MD 21030

RE: Circuit Court Civil Action No. 03-C-06-011166
Petition for Judicial Review
James G. Hammond
Board of Appeals Case No.: 03-366-SPH

Dear Mr. Hammond:

Notice is hereby given, in accordance with the Maryland Rules, that a Petition for Judicial Review was filed on October 20, 2006, 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 . 03-C-06-1116.**

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Linda B. Fliegel

Linda B. Fliegel
Legal Secretary

/lbf
Enclosure

Clerk of the Court/Former Civil Action #03-C-12458
John C. Murphy
Peter Max Zimmerman, Esquire
William J. Wiseman, III, Zoning Commissioner
Timothy M. Kotroco, Director/PDM
Barbara Jung
Kim Detrick
Ken Sadofsky

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County Board of Appeals of Baltimore County

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

November 6, 2006

John C. Murphy, Esquire
516 N. Charles Street – Ste. 206
Baltimore, MD 21201

RE: Circuit Court Civil Action No. 03-C-06-11166
Petition for Judicial Review
James G. Hammond
Board of Appeals Case No.: 03-366-SPH

Dear Mr. Murphy:

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 and must be paid in time to transmit the same to the Circuit Court within the sixty day timeframe, as stated in the Maryland Rules.

The Court Reporter that you need to contact to obtain the transcript and make arrangement for payment is as follows:

CAROLYN PEATT
TELEPHONE: 410- 486-8209
HEARING DATE: February 28, 2006 (On Remand from CSA)

This office has also notified Ms. Peatt that a transcript on the above captioned matter is due by December 7, 2006, for filing in the Circuit Court. A copy of your Petition, which includes your telephone number, has been provided to the Court Reporter, which enables her to contact you for payment provisions.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Linda B. Fliegel

Linda B. Fliegel
Legal Secretary

/lbf
Enclosure

c: Carolyn Peatt, Court Reporter
Peter M. Zimmerman, Esq.
James G. Hammond

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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 28, 2006

John C. Murphy, Esquire
516 N. Charles Street
Suite 206
Baltimore, MD 21201

RE: Circuit Case #C-03-12458 *In the Matter of James G. Hammond* /Case No. 03-361-SPH
On Remand from the Circuit Court for Baltimore County

Dear Mr. Murphy:

Enclosed please find a copy of the Board's Opinion and Order issued this date in response to the Remand Order of the Circuit Court for Baltimore County.

c: James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
Office of People's Counsel
Pat Keller, Planning Director
William J. Wiseman, Zoning Commissioner
Timothy M. Kotroco, Director /PDM
Clerk of the Court /Civil Action #C-03-12458

Printed with Soybean Ink on Recycled Paper

9/27/06

IN THE MATTER OF	*	ON REMAND
THE APPLICATION OF		
JAMES G. HAMMOND	*	FROM THE
PETITIONER/LEGAL OWNER		
FOR A SPECIAL HEARING OF	*	FOR
PROPERTY LOCATED ON THE W/S		
OF FALLS ROAD 2,200 FEET NORTH	*	CIRCUIT COURT FOR
BROADWAY ROAD		
(11942 & 11950 FALLS ROAD)	*	BALTIMORE COUNTY
	*	Civil Action
8TH ELECTION DISTRICT		No. C-03-12458
3RD COUNCILMANIC DISTRICT	*	
CASE NO.: 03-366-SPH		

* * * * * * * * * * * *

ORDER OF REMAND BY ORDER
OF THE CIRCUIT COURT FOR BALTIMORE COUNTY
PURSUANT TO ORDER OF THE MARYLAND COURT OF SPECIAL APPEALS

This matter comes before the Board of Appeals as a result of a remand from the Court of Special Appeals of Maryland, Sept. Term 2004, Case No. 00980 (unreported - dated Nov. 15, 2005) (hereinafter referred to as *Hammond*) arising from an appeal of the Board's decision in the above matter dated October 17, 2003. The case was originally heard before Board members Stahl, Worrall, and Marks. Several terms having expired, proceedings subsequent to the remand were heard by members Stahl, Brassil, and Crizer.

We will not here repeat the entire factual presentations of the parties below. We address ourselves solely to the directions of the Court of Special Appeals upon its remand.

The Appellate Court determined that the finding by the original Board that the subject lawnmower business was itself a nonconforming use was erroneous, and therefore formed an inappropriate basis for a decision based upon that determination that the lawnmower "nonconforming use" had lapsed. The decision of the Board was vacated. The Court explained, "the Board's erroneous determination that the lawnmower business was a nonconforming use is

not just an academic point. As noted, having determined that the lawnmower business was the nonconforming use, the Board went on to find that the use had in fact lapsed. On that basis it then concluded that Appellant was not entitled to operate the lawnmower business.

There is no question that the lawnmower sales and service operation was abandoned for more than one year before Hammond acquired the property. But, the effect of such a lapse is not necessarily the same if such a use was an intensification of a nonconforming use, rather than a nonconforming use itself." The Court then instructed that "on remand, it is incumbent upon the Board to determine whether the lawnmower business is a lawful intensification of the original use." *Hammond*]

The Court provided considerable guidance as to the law applicable in determining whether or not a use is or is not an intensification. Although it appears in detail in the Court's Opinion of November 15, 2005, we note hear selected portions in reaching our instant determination.

The Court identified four factors in determining "whether the current activity is within the scope of the nonconforming use...." *Hammond,* McKemy v. Baltimore County, 39 Md. App. 257, 269 (1978). Those factors, noted in pages 269-70 are as follows:

> (1) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use?;
>
> (2) Is the current use merely a different manner of utilizing the original non-conforming use, or does it constitute a use different in character, nature, and kind?;
>
> (3) Does the current use have a substantially different effect upon the neighborhood?;

(4) Is the current use a "drastic enlargement or extension" of the original non-conforming use?.

The Court quoted with approval the language contained in *Hammond,* Phillips v. Zoning Commissioner, 225 Md. App. 202, 110-111 (1961) in which the court stated:

> "While it is true that mere intensification of a nonconforming use is permissible, so long that the nature of use is not substantially changed, it is generally recognized that the right of a land owner to continue the same kind of use to which the property was devoted on the critical date does not confer on him the right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use."

The Court went on to adopt the language of the Court of Appeals in *Hammond,* Jahnigen v. Staley, 245 Md. 130, 137 (1967), in which the Court recognized the concept that "an intensification of a nonconforming use is permissible so long as the nature and character of use is unchanged and is substantially the same facilities are used."

Further, the Court provided its earlier thoughts and observations regarding "intensification" and "extension" found in *Hammond,* Feldstein v. La Vale Z.B., 246 Md. 204 (1967) wherein the Court stated:

> "The zoning ordinance...provides that a nonconforming use shall not be extended, but that does not mean that the vested use of the junkyard owner cannot be lawfully intensified. The Chancellors held that the increase in quantity and height of the storage scrap metal was an intensification and not an extension under the law. We agree....While a nonconforming use should not be extended or perpetuated longer than necessary, the more frequent present use of property for the same or similar use then that for which it had been used less frequently theretofore was held to be an intensification and not an extension....

Id. at 211; and further, in *Hammond,* Prince George's County v. F.L.Gardiner, Inc., 47 Md. App. 471, 476 (1981), reversed on other grounds, 293 Md. 259 (1982), the Court observed "conversely, an increase in the volume of an existing business is usually

referred to as an intensification rather than an enlargement and such an intensification has been permitted under a valid nonconforming use."

Finally, the Court provided two previous examples of the application of these concepts; first in *Hammond,* Kastendike v. Baltimore Association for Retarded Children, Inc., 267 Md. 389 (1972) in which the Court determined that a change and use of a nonconforming use of a nursing home, from treating alcoholics and the elderly to treating mentally retarded adults, did not amount to a zoning violation. In considering whether the change was a lawful intensification of the prior uses, the Court explained that "the similarities between the various uses of the premises as a nursing home are greater than the differences and the changes, if any, in the type of patients cared for are inconsequential." *Hammond,* Id. at 398. Finally, the Court presented the matter of *Hammond,* Nyburg v. Solmon, 205 Md. 150, 161 (1954) containing a holding that a nonconforming use for the operation of a garage, storing cars, and selling gasoline could expand to include storage of new cars before shipment to a dealership; and that to do so was "not an extension but merely an intensification of a long continued nonconforming use." The majority therefore finds that the sales and service of lawnmowers and related equipment in and of itself is not a nonconforming use, but rather is included in the previously and continuing to exist nonconforming use country store. For reasons stated by the Court of Appeals in its most recent decision, both sales and services are not limited to items purchased only at the subject location.

We find that the central nature and character of the current use of lawnmower sales and service is unchanged and is the same today as it was allowed and made a part of the originally approved nonconforming use store. It is in no way different today than then.

As the cited case law supports, neither an increase in quantity, physical structure, or frequency (Feldstein) nor an increase in volume of business (County Council of Prince George's County v. Gardner), will render such activity as in the instant case an enlargement rather than an intensification of a nonconforming use. The structure and volume of Petitioner's request is not an alteration of activity from the original incarnation; rather it simply reflects the natural evolution of these types of services through the intervening years for the sales and service of lawnmowers provided in the originally approved nonconforming use to those same services provided in today's more advanced technological and use market.

Turning finally to the four part criteria contained in McKemy, Supra., the majority finds that the current requested use does in fact reflect the nature and purpose of "lawnmower sales and service" contained in the original nonconforming use; that it is the same manner of service provided as to lawnmowers and related equipment previously provided; that, under the case law the current use in no way can be determined to be a "drastic enlargement" of services previously provided.

As to the fourth criteria, the majority is mindful of the needs and concerns of the surrounding community wishing to maintain their esthetic quality of life. While the majority holds that the "nature" of the effect of the requested use is not substantially different of that of its earlier level, we believe that certain restrictions should be placed upon the Petitioner's use to insure that any effect at all conceivable will be a meliorated. Those conditions are:

a. That sales and service of lawnmowers and related equipment are to be limited to those items utilized by homeowners only. No sales and service of equipment of a commercial nature will be permitted.

b. That a small trailer, capable of transporting two pieces of permitted equipment will be allowed to be operated by Petitioner for the transportation of the equipment sold and serviced at the location. Moreover, a small forklift will be permitted and limited to the loading and unloading of the trailer. Both the trailer and the small forklift will be stored at the rear of the property in order to remain as unobtrusive as possible.

c. The repair shop must be located at the extreme back of the property.

d. No repair of motor vehicles of any description will be allowed.

e. The related equipment permissible on the property for sales and service purposes will include lawnmowers, tillers, chippers, and like items. The repair of equipment, as well as its transportation, loading or unloading, shall take place only Monday through Friday from 9:00 a.m. to 6:00 p.m. Petitioner may maintain business hours on the weekends as desired by him, but in no event shall loading, off-loading, or any repairs be carried out on Saturday or Sunday.

ORDER

THEREFORE, IT IS THIS 28th day of September, 2006 by the County Board of Appeals of Baltimore County

ORDERED that, for the reasons as stated in the foregoing Opinion, Petitioner's request for special hearing be and the same is hereby **GRANTED**, subject to the following conditions:

1. That sales and service of lawnmowers and related equipment are to be limited to those items utilized by homeowners only. No sales and service of equipment of a commercial nature will be permitted.

2. That a small trailer, capable of transporting two pieces of permitted equipment will be allowed to be operated by Petitioner for the transportation of the equipment sold and serviced at the location. Moreover, a small forklift will be permitted and limited to the loading and unloading of the trailer. Both the trailer and the small forklift will be stored at the rear of the property in order to remain as unobtrusive as possible.

3. The repair shop must be located at the extreme back of the property.

4. No repair of motor vehicles of any description will be allowed.

5. The related equipment permissible on the property for sales and service purposes will include lawnmowers, tillers, chippers, and like items. The repair of equipment, as well as its transportation, loading or unloading, shall take place only Monday through Friday from 9:00 a.m. to 6:00 p.m. Petitioner may maintain business hours on the weekends as desired by him, but in no event shall loading, off-loading, or any repairs be carried out on Saturday or Sunday.

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 M. Stahl, Panel Chairman

Edward W. Crizer, Jr.

IN THE MATTER OF	*	ON REMAND
THE APPLICATION OF		
JAMES G. HAMMOND	*	FROM THE
PETITIONER/LEGAL OWNER		
FOR A SPECIAL HEARING OF	*	FOR
PROPERTY LOCATED ON THE W/S		
OF FALLS ROAD 2,200 FEET NORTH	*	CIRCUIT COURT FOR
BROADWAY ROAD		
(11942 & 11950 FALLS ROAD)	*	BALTIMORE COUNTY
	*	Civil Action
8TH ELECTION DISTRICT		No. C-03-12458
3RD COUNCILMANIC DISTRICT	*	
CASE NO.: 03-366-SPH		

* * * * * * * * * * * *

DISSENTING OPINION ON REMAND

I respectfully dissent from the majority opinion of the County Board of Appeals in this case. The majority believe that proposed use of the subject site is similar enough to the permissible intensification approved in 1988 to allow it. I looked at the evidence and the law and argue that the proposed use is different, that it departs from the original use in spirit, intent and function, and that it has a significant impact on the surrounding area as to cause it to be an impermissible expansion.

In her opinion remanding this case back to the Circuit Court for Baltimore County for remand to the Board of Appeals, Court of Special Appeals Judge Eileen Hollander charged the Board with determining "whether the lawn mower business is a lawful intensification of the original nonconforming use. Put another way, the question is whether an intensification may be abandoned when the original nonconforming use has not been abandoned." (Hollander opinion, p. 44) Judge Hollander thus poses two separate questions for the Board to now consider. I will address these questions in inverse order.

1. May an intensification be abandoned when the original nonconforming use has not been abandoned?

Neither the Court of Special Appeals opinion, nor any of the briefs, including People's Counsel's, cites any cases regarding the abandonment and reintroduction of an intensification use in conjunction with a nonconforming use. Barbara Jung, in her brief, notes this omission and points out "This may very well be a case of first impression in Maryland." The absence of any precedent to guide this issue may explain in part why Mr. Hammond was advised by the County that the lawnmower sales and service use was still valid.

Mr. Hammond's arguments can be summarized as saying that the reintroduction of a permitted intensification use should be automatic; that, once such a use is granted, the use remains valid, even if it were abandoned for a period of time, no matter how much time had elapsed.

However, this case itself is a clear example of why that argument should not be accepted. For 17 years, the residents of this area (which is all residentially zoned RC-4) have lived next to a quiet, unobtrusive Country Store and Antique Shop. The reintroduction of a lawn mower business, after so many years, is quite a change. It's a truism that time changes all things: Neighborhoods change, property values change, even people's tolerance for noise changes. The reintroduction of a once-permitted intensification should require the same scrutiny that the original permission required.

Furthermore, when all the case law on nonconforming uses, permissible intensifications, and impermissible expansions, is considered (for extensive summaries of the relevant case law, see *Hammond* opinion pages 35-42, and People's Counsel for Baltimore County's Remand Memorandum, dated February 22, 2006, pages 8-13), it would seem contrary to the spirit and intent of nonconforming use law to allow a lapsed intensification to automatically be reinstated without at least a hearing as to whether it continued to meet the criteria for a permissible

intensification of a nonconforming use. A hearing should be necessary to determine the very heart of the matter regarding nonconforming uses: whether the proposed use is a change in use or whether it is an expansion beyond what the law says is permissible.

A Special Hearing was in fact held on March 20, 2003, to address this question. An appeal from the decision in that hearing was made to the Baltimore County Board of Appeals. The appeals from that decision led to this remand back to the Baltimore County Board of Appeals, so we could address the next question, which was left unaddressed in its original decision.

2. Is the lawnmower business proposed by Hammond a lawful intensification of the original nonconforming use?

Judge Hollander writes in her opinion, "Even if we agreed with appellant's construction of the Haines Decision, we hasten to add that it is not at all clear that the business that was subject of the Haines Decision is, indeed, identical to appellant's proposed business. In deciding whether the Haines Decision is entitled to preclusive effect, that looms large" (page 46).

Thus, if Hammond's proposal remains within the scope of the business approved in 1988, it could possibly be considered a lawful intensification.

My colleagues believe Hammond's proposal is within the scope of the original. I disagree. During deliberation, my colleagues went to great lengths to create criteria that would contain the business. Questions such as how much horsepower could be allowed were discussed. That it is necessary to put such restrictions on the proposed business seems, to me, to be one indication that Hammond's proposal would adversely impact the surrounding area.

A review of the law and evidence in the case provides additional support for the conclusion that this is an impermissible expansion of the original nonconforming use.

The criteria for determining a lawful intensification are found in *McKemy v. Baltimore County*, 39 Md. App. 257, 269 (1978):

1. to what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;

2. is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature and kind;

3. does the current use have a substantially different effect upon the neighborhood;

4. is the current use a "drastic enlargement or extension " of the original non-conforming use.

Prince George's County v. F.L. Gardiner, Inc., 47 Md. App. 471, 476 (1981) provides an important distinction between impermissible expansions or extensions and permissible intensifications. An increase in volume of a business is viewed as permissible intensification, while increases in lot size, building size, change in business methods, or "the provision of new accessory facilities with the resulting extension of the use involved have all been held to be proposals for the enlargement of a non-conforming use."

Therefore, if Hammond's proposal were merely an increase in volume of activity and if it met the *McKemy* criteria, it could be considered a permissible intensification. After reviewing the evidence and testimony, I find that Hammond's proposal is not just an increase in business volume and it does not meet the *McKemy* criteria for the following reasons.

First, in his Findings of Fact and Conclusions of law, Zoning Commissioner Haines in 1988 found, and everyone seems to agree, that the nonconforming use is the Country Store, which has been in continuous operation on the property since 1915, well before zoning in Baltimore County. Haines then went on to state that the "basic operation has remained the same,

however, the services have been added to and altered somewhat over the years." He determined that the lawn mower sales and services was a permissible intensification, while the plant and Christmas tree sales were accessory activities.

While the Haines decision clearly places the lawn mower business as subsidiary to the Country Store, Mr. Hammond's proposal seems to make the country store subsidiary to the lawnmower business. In his testimony, Mr. Hammond stated that his "primary purpose was to sell and service lawnmowers. That was my intent.... I also collect antique lawn tractors, small lawnmowers, and Gravely was one of the tractors I collect and I want to be a dealership for them." (Transcript, pages 28-29). When asked specifically what he proposed to do on the property, Mr. Hammond replied: "I propose to have a lawnmower sales and service operation selling Gravely, Hyondai (phonetic), steel..." (Transcript page 38).

In his brief, Mr. Hammond also states that he has been unable to "start his business" as though the lawn mower sales and services were the primary business. Mr. Hammond owns the Country Store, and that has continued operation throughout these appeals and proceedings.

Second, in his order, Haines granted approval to: "a Country Store, with Food and Grocery sales and Deli operation, Household hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for Sale, not including contractors or construction companies, landscaping or trucking operation or an automobile service garage, *as indicated on Petitioner's Exhibit 1, which shall become the final development plan and final site plan"* (Italics added). It is, therefore, necessary to compare the development plan and site plan from 1988 with the current proposal in deciding whether the proposal passes McKemy's criteria, and the *Gardiner* distinction.

In his testimony, Mr. Hammond stated that his lawnmower business would be in Buildings B and C, and lawnmowers awaiting repair would be stored in the covered area in front of one of the buildings and a fenced area behind them (Petitioner's Exhibit 8). He further stated that he proposed to use Building B for repair work and turn Building C into a showroom for new equipment. Mr. Dold, who operated the Country Store at the time the Haines decision was made, testified that his lawn mower business was only in Building B on the plat (Petitioner's Exhibit 8). In his opinion, Zoning Commissioner Haines' Opinion states that Building C "is and will remain a storage building." Mr. Hammond's proposal to turn this building into a for new equipment is, therefore, a completely new use compared to the use Haines allowed (Transcript p. 46).

This new use and the change in relationship between the country store and the lawnmower business are what make Mr. Hammond's proposal an impermissible expansion of the Country Store. He seems to be converting the nonconforming use into a lawnmower business. He is using more space, by turning Building C into a showroom, than Mr. Dold had used. The proposed use, therefore, fails three of the four *McKemy* criteria and the *Gardiner* distinction. It is not just an increase in volume of an already existing business, but is attempting to be a new and different business. Its potential negative impact on the community is reflected in my colleagues' attempts to place restraints on the business. A country store in a residential area is one thing. A machine shop is another. This proposal seems to be for a machine shop, which is a wholly new use and therefore, impermissible.

Margaret Brassil, Ph.D.

DATE: 9/27/06

3/29/06

IN RE PETITION FOR SPECIAL HEARING
11942 and 11950 Falls Road
Legal Owner: James G. Hammond

CASE # 03-366-SPH

Respondent's Memorandum

This case began in February 2003 when Mr. Hammond filed for a Special hearing in front of the Zoning Commissioner for Baltimore County for a clarification of what services he would be allowed to offer at 11942 and 11950 Falls Road. It has dragged on through the Board of Appeals, the Circuit Court for Baltimore County and the Court of Special Appeals. In an effort to resolve the issue, but more importantly, in an effort to protect the integrity of the neighborhood where I have lived for 23 years, Mr. Hammond and I attempted to enter into a settlement which I felt gave myself and the neighbors some protection from the noise, traffic and unsightliness that the commercial property in the middle of a residential neighborhood poses. The front portion of the property is used as a General Store. For approximately the last two years, the person who rented the front store has operated the General Store, the gasoline pumps as well as an outdoor open pit beef stand which has only added noise, traffic and now smoke to the unsightliness. Since this case began, the property has fallen into an even worse state of repair.

Ever mindful of what my support for Bob Dold in 1988 has cost me, I am reluctant to agree that Mr. Hammond's proposed use, as laid out in the Stipulation, is a lawful intensification because of what the future may bring. If 31 horsepower is a lawful intensification of the 20 horsepower mowers Bob Dold repaired in 1988, what will this Board find to be a lawful intensification 10 years from now? 40 horsepower? Does this continue ad infitnitum until 100 horsepower mowers are being repaired in my front yard?

For these reasons, I cannot enter into a Stipulation in which I must agree or the Board must find the proposed use to be a lawful intensification, not because of the present use, but because what the future will surly bring. I do not do this lightly because by doing so, I am giving up what little protection the

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Stipulation and Agreement would have afforded me. So far in this struggle, Baltimore County has done nothing to protect the local homeowners.

Therefore, it is my position that I am no longer in agreement with the proposed Stipulation and the Board must make a determination as ordered by Judge Hollander.

The above case has been remanded to the Board of Appeals for Baltimore County from the Court of Special Appeals. Judge Hollander, speaking for the Court of Special Appeals, stated at page 44, that "it is incumbent upon the Board to determine whether the lawn mower business is a lawful intensification of the original non-conforming use." Judge Hollander continues, "it is not at all clear that the business that was the subject of the Haines' decision (Dold's Lawn Mower Repair Service) is indeed identical to the appellant's proposed business."

The record from the first hearing before the Board of Appeals is the only evidence of the Dold use in 1988 and the testimony of Mr. Hammond in that same hearing is the only evidence of his intended use. The proposed Stipulation is not evidence for the Board to consider in making the decision of whether Mr. Hammond's intended use is a lawful intensification of the Dold use.

Bob Dold operated his lawn mower repair business on the property from 1972-1988. (Transcript p.77) After Mr. Dold ceased lawn mower repairs in 1988, the rear building was rented out as a gift shop and an antique shop. (Transcript p. 116) Mr. Hammond, in writing to the County acknowledged that he was seeking to re-establish the use for lawn mower repairs. (Transcript p. 30) Mr. Hammond acknowledged in his testimony that Bob Dold testified in an earlier hearing in front of the Zoning Commissioner that he (Mr. Dold) worked on engines up to 20 horsepower. (Transcript p. 62) This is the only evidence before the Board as to the prior use.

There is ample evidence of Mr. Hammond's proposed use through his own words. Mr. Hammond testified before Deputy Zoning Commissioner Kotroco in a prior hearing that he intends to work on engines up to 100 horsepower. (Transcript p. 61) He testified that he told the Falls Road Community Association that he intended to work on mowers from 7:00 a.m. until 6:00 p.m. Monday through Saturday. (Transcript p. 55) Mr.

Hammond testified before Commissioner Kotroko that he keeps a forklift on the property to unload equipment. (Transcript p. 55) Mr. Hammond further testified that he keeps a front-end loader on the property to move things around. (Transcript p. 56) Mr. Hammond testified that he wanted to buy a trailer to hail 5 or 6 mowers to and around the property. (Transcript p. 56)

Mr. Hammond testified that he has a 7-½ horsepower air compressor to use with impact wrenches and air ratchets (Trans. P. 56), that he keeps his personal wood chipper on the property (Trans. P. 58) and that he stores 2 or 3 of his personal cars on the property (trans. P. 58)

Mr. Hammond testified that in the fall of 2002/ winter 2003, although the business had not yet opened, that he had a large commercial tree trimming truck parked on the open lot adjacent to Falls Road for one month while he waited for parts. (Transcript p. 57-58)

Repeating Judge Hollander's words in her opinion at page 46, "It is not at all clear that the business that was the subject of the Haines' decision is indeed identical to the appellant's proposed business". Judge Hollander continued, "In deciding whether the Haines decision is entitled preclusive effect, that issue looms large."

This Board must decided, based only on the record before it, whether the intended use by Mr. Hammond is a lawful intensification of a non-conforming use or an unlawful extension of the non-conforming use. Judge Hollander indicates that the Courts have made it clear that "there is a strong disinclination in Maryland and elsewhere to permit the expansion of non conforming uses". **County Council of Prince Georges County v. Gardner 293 Md. 259 (1982)** The Court in Gardner continued that " a primary goal of zoning law has been to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned". It is also clear that the burden of proof to show that an intended use is a lawful intensification rests with Mr. Hammond.

Judge Hollander cited the pertinent law in Maryland for intensification v. enlargement of non-conforming uses. It is the Board's job to apply that law to the facts already in the record. Bob Dold had a mower repair shop where he worked on engines up to 20 horsepower; Mr. Hammond proposes to fix engines up to 100 horsepower. There is no evidence that Bob Dold had a forklift and a front-end loader; Mr. Hammond

proposes to use both. Bob Dold had a trailer to pick up single mowers; Mr. Hammond proposes to have a trailer big enough to haul five or six mowers. There is no evidence that Bob Dold kept 2 or 3 of his personal cars on the lot or that he kept his personal lawn equipment on the lot. Mr. Hammond conceded that he kept his extra cars and his personal commercial grade wood chipper on the lot. There is no evidence of what hours were kept by Mr. Dold; Mr. Hammond proposes to work on engines from 7:00 a.m. until 6:00 p.m. six days a week. Even from this record, it is clear that the operation proposed by Mr. Hammond is not identical or even close to the shop run by Mr. Dold. Again quoting Judge Hollander, "It is not at all clear that the business that was the subject of the Haines' decision is indeed identical to the appellant's proposed business". It is also not a lawful intensification. Applying the criteria set out by Judge Wilner in **McKemy v. Baltimore County 39 Md. Ap. 257 (1978)** makes it clear that Mr. Hammond's proposal is an unlawful extension of the non-conforming use. The four factors are:

(1) To what extent does the current use reflect the nature and purpose of the original non conforming use;
(2) Is the current (proposed) use merely a different manner of utilizing the original non-conforming use or does it constitute a use different in **character, use and kind**;
(3) Does the proposed use have a substantially different effect on the neighborhood;
(4) Is the proposed use a drastic enlargement or extension of the original nonconforming use?

Applying these facts to the four criteria leads to the conclusion that Mr. Hammond's proposed use is an unlawful enlargement. His proposed use is certainly of a different character, use and kind then the Dold use. The evidence is ample that the proposed use does have a substantially different effect on the neighborhood. If the Board finds that the use to repair 100 horsepower motors, using front-end loaders and forklifts is an intensification, what will be the lawful intensification 10 years from now? 150 horsepower motors and a fleet of front-end loaders and forklifts? Letting non-conforming uses get a little bigger gradually over time leads to a point where there is a non-conforming use no one considered or foresaw except for those people who live with it everyday. Does Mr. Hammond's use sound like an accessory use that would belong with a small country store?

Or does it sound like a tractor Jiffy Lube in the middle of the Falls Road Valley?

Judge Hollander also said in her opinion at page 44 that "the question is whether an intensification may be abandoned when the original non-conforming use has not been abandoned". This is an important issue that should not be overlooked by the Board. This Board, in it's Opinion dated October 17, 2003, found that "this Board unanimously finds that the owner of the subject site did indeed allow the non-conforming use of lawn mower sales and service to be abandoned for a period of one year; and that pursuant to Baltimore County Zoning Regulation Section 104.1, the permission to carry on those activities at the subject site no longer exists". Although the Court of Special Appeals reversed, Judge Hollander made clear that the reversal was predicated on the finding by the Board that the lawn mower repair use was a separate non-conforming use. Judge Hollander found that it was not a separate non-conforming use but she clearly does not hold that it can't be abandoned by non-use as a lawn mower repair service for a period of 15 years. That is why she told this Board that it must answer the question of "whether the intensification can be abandoned when the original non-conforming use has not been abandoned".

The record from the prior hearing is clear and not contradicted that lawn mower repairs were not done on the property after 1988. The evidence is again not contradicted that the use of the rear building changed from mower repairs to a gift shop and an antique shop. The use changed to a less offensive use after 1988 until, in 2001, Mr. Hammond sought to re-establish the mower repair shop.

Judge Hollander nor I are able to cite any cases in Maryland that hold that an intensification of a non-conforming use can be abandoned even if the original non-conforming use has not been abandoned. This may very well be a case of first impression in Maryland. However, a reading of the non-conforming use cases, the abandonment cases and the change in use cases leads to the logical conclusion that an owner of property with a non-conforming use should not be allowed to cease an intensified use for a period of 15 years and then revive the use. This flies in the face of Maryland law that does not favor non-conforming uses and the Zoning Regulations that are geared to eliminate non-conforming uses and to restore properties to conforming uses.

The Board alluded to this in it's prior Opinion when it held "we... reject the Petitioner's contention that, even though no lawnmower repairs have been done on the subject property for 15 years, the continued non-conforming existence of the country store carries with it the right to essentially re-instate the non-conforming use of sales and repair of lawn mowers at this time". An intensification of a non-conforming use (lawn mower repairs) can be abandoned even though the original use (as a country store) has not been abandoned.

ESTOPPEL AND VESTED RIGHTS

Judge Hollander, at page 54, directs the Board to address Mr. Hammond's estoppel and vested rights arguments if the Board finds that his proposed use is not a lawful intensification. In reference to the estoppel argument, Judge Hollander, on page 55, stated that "the Court of Appeals has applied the doctrine of equitable estoppel in the context of zoning matters only on rare occasions".

The general rule of estoppel, as used in the context of zoning cases, is that "the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances because of an error or mistake committed by one of it's officers or agents which has been relied on by a third party to his detriment." **Lipsitz v. Parr 164 Md. 222 (1933)**

The Court of Appeals did not allow a property owner to assert estoppel in a case where the County official advised the property owner that the County could convey a right of way to the property owner, although this advice was incorrect. **Inlet Associates v. Assateague House Condominium Association et al. 313 Md. 413 (1988)** The Court of Appeals again refused to allow the defense of estopplel in a situation where the County official advised the property owner that he did not have to apply for a building permit for a project. Relying on that advice, the project was built. The Court affirmed the holding of the Board of Appeals in that case which held that although "this was a hard case, with sympathy flowing towards Long Meadow because of it's reliance upon the faulty advice from a source from which it had expected better and that it did so at substantial

detriment to itself", the defense of estoppel was not available to the property owner. **The City of Hagerstown et al v. Long Meadow Shopping Center 264 Md. 481 (1972)**

In a case much like the present case, The Court of Special Appeals held that the defense of estoppel was not available to United Parcel Services when it relied on the advice of then Zoning Commissioner Arnold Jablon as to the permitted use for a property they were intending to purchase. Relying on that advice, U.P.S. purchased the property and began building. When a neighbor objected, that Board of Appeals found that Mr. Jablon's advice was wrong and that the County was not estopped from enforcing the correct interpretation of the permitted use. **United Parcel Service, Inc. v. Peoples Counsel for Baltimore County 93 Md. Ap. 59 (1992)** reversed on procedural grounds **United Parcel Services, Inc. and Baltimore County, Maryland v. Peoples Counsel for Baltimore County 336 Md. 569 (1994)**

The holdings in these three cases make it clear that even though Mr. Hammond relied on the advice of Mr. Moxley, who responded to Mr. Hammond's inquiry at the behest of the Zoning Commissioner, and the advice was wrong, Mr. Hammond is not allowed to assert the defense of estoppel to defeat Baltimore County's duty to enforce it's zoning regulations.

As to the vested rights argument, Judge Hollander stated at page 55 that vested rights "provides that a landowner may rely on nothing other then a validly issued permit and that a substantial change in circumstances will not be found unless the landowner begins actual above-ground construction". The cases further hold that there must be a change in the zoning classification for vested rights to apply. **Prince Georges County v. Sunrise Development Limited Partnership 330 Md. 297 (1993), Town of Sykesville v. West Shore Communications Inc. 119 Md. Ap. 300 (1996), Pemburton v. Montgomery County, Md. 275 Md. 363 (1975) and Prince Georges County v. Equitable Trust Co. 44 Md. Ap. 272 (1979)** A classic example of a vested right claim is when a developer buys property, is issued building permits and begins building that is visible to the general public and the County subsequently changes the zoning classification, the developer may finish the project. The facts in the present case do not

support a defense of vested rights. Mr. Hammond did not rely on a validly issued building permit and there was not a subsequent change in zoning.

Therefore, the Board should deny Mr. Hammond's claim that the County is barred from enforcing the Zoning Regulations based on estoppel or vested rights arguments.

Respectfully Submitted,

Barbara R. Jung

Barbara R. Jung, pro se

I hereby certify that on the 29 day of March 2006, I sent a copy of this Memorandum to John C. Murphy, Esq., Suite 206, 516 N. Charles Street, Baltimore, Maryland 21201 and Peter Zimmerman, Esq., People's Counsel for Baltimore County, Room 47, Old Courthouse, 400 Washington Avenue, Towson, Maryland, 21204

3/29/06

RE: PETITION FOR SPECIAL HEARING 11942 & 11950 Falls Road; W/S of Falls Road, 2,200' N of Broadway Road 8th Election & 3rd Councilmanic Districts Legal Owner(s): James G. Hammond Petitioner(s)	*	BEFORE THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY 03-366-SPH

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* * * * * * * * * * * *

PEOPLE'S COUNSEL'S SECOND REMAND MEMORANDUM, POST-HEARING

People's Counsel for Baltimore County files this memorandum pursuant to the instruction of the County Board of Appeals (CBA) at the conclusion of the remand hearing February 28, 2006. This supplements the memorandum previously filed. The present memorandum addresses the nature, extent, and impact of change in the proposed resumption of the nonconforming use.

We are conscious of the effort of the Petitioner and Barbara Jung to reach a settlement of this case. As we stated at the hearing, however, this case has proceeded in a legal process subject to public law. This has resulted in a legal determination by the Court of Special Appeals as to the applicable law and the necessity for a remand, including factual findings and legal conclusions by the County Board of Appeals. The resolution of this case must be consistent with public law and the task assigned on remand. It will affect all property owners in the neighborhood and the public in general. Therefore, it cannot be resolved simply by approval of a privately negotiated settlement, whether by some or all of the parties appearing before the CBA. See. e.g. Attman/Glazer v. Mayor & Aldermen 314 Md. 675 (1989).

This memorandum shall address the issues of nonconforming use law assigned to the CBA on remand. We hope to help resolve this difficult and unfortunate case. We shall not repeat

the discussion of estoppel and vested rights addressed in our first remand memorandum. There, we attempted to demonstrate that these doctrines have no application to the present case.

I. The Scope of the Inquiry: the Legal Background

The focus here is on a more detailed discussion the Court of Special Appeals' (CSA) direction to evaluate whether or not Petitioner Hammond's proposed use is a permissible intensification or impermissible extension of the original nonconforming use for a country store. The context also includes the recognition that the 1988 approval of the Dold family's lawnmower sales and service operation was judged at the time to be a legitimate intensification of and accessory to the country store use. Therefore, its discontinuity after 1988 would not preclude the resumption of that particular use.

The key question presented is whether Mr. Hammond's proposed use is sufficiently similar to the Dold operation to fit with its spirit and intent, or whether by virtue of alteration in facilities, equipment, product, area or building use it crosses the line to an extension. As a corollary, because the CSA held the Dold use could be resumed, it is the task of the County Board of Appeals to define the scope and extent of the permissible Dold use in a way which is both accurate and specific enough to guard against a potential expansion or growth beyond the permissible limit.

It is not enough simply to say that both the Dold and Hammond uses involve "lawnmower sales and service." We have discussed in detail Jahnigen v. Staley 245 Md. 130 (1967) and McKemy v. Baltimore County 39 Md. App. 257 (1977). The uses in Jahnigen, old and new, were marina uses. The uses in McKemy, old and new, could be described as parking of motor vehicles in connection with a business use across the street. Both cases, however, called

for detailed analysis of the nature and extent of the change in use in order to distinguish a permissible intensification from an impermissible extension.

The Court of Appeals has also warned in Phillips v. Zoning Commissioner 225 Md. 102 (1961) of the dangers of the evolution, by some sort of "creeping process," to a use different in character from the original use. There, the original use was a used car lot and a warehouse for the storage of second hand furniture. It gradually evolved into a junkyard, which the Court found to be an impermissible extension.

On the national scene, many cases and controversies have arisen as to the impact of addition or expansion of facilities, extensions to new parts of a building, and the additions of new products, activities, or services. These usually involve impermissible extensions. On the other hand, a change in volume, intensity or frequency usually denotes a permissible intensification. To illustrate, we attach Anderson, American Law of Zoning (Young, 4th Ed. 1996), Secs. 6.47 to 6.50.

History; Origin of the Current Controversy

The original nonconforming use dates from prior to 1945, when zoning first came to Baltimore County. The current zoning is R.C. 4, Watershed Protection. As of the 1988 decision of Zoning Commissioner Haines, the zoning was R.C. 5, Rural-Residential. His opinion states the property has always been zoned residential. Therefore, a business use in existence before zoning and which continued thereafter became a nonconforming use.

It is apparent from the record that Mr. Hammond's proposals and activities raised concerns among area citizens that his proposed use goes beyond the original country store/lawnmower use and was heading in the direction of a service garage or, as neighbor Ms. Barbara Jung described it in her opening statement at the original hearing of the present case, a

Jiffy Lube. This led to the zoning office's request that Mr. Hammond file a petition for special hearing. The litigation followed, all the way up to the CSA. On remand, just recently, a tentative proposed settlement between Petitioner Hammond and Ms. Jung attempted to resolve the matter by the allowance of certain limited lawnmower sales and service uses, but without any agreement as to a description of "intensification."

In any event, as noted, the Court of Special Appeals has instructed the CBA to make a legal determination with respect to the scope and extent of the permissible nonconforming use and apply it to the facts.

To evaluate the problem, it is necessary to describe and compare the original nonconforming use, the Dold lawnmower sales and service intensification as of 1988, and the proposed Hammond use circa 2001-06. As will be seen, the problem is complicated by the amount of time passed since 1945, the generality or vagueness of the description of the Dold operation, its discontinuity for many years, and the generality or uncertainty in the descriptions of Petitioner Hammond's proposed operation.

The available sources of the facts are ZC Haines' 1988 decision and the 2003 CBA transcript. With these in mind, we attempt a comparative analysis.

The 1988 Zoning Commissioner Decision

The petition in the 1988 (89-204-SPH) case lists the use of Building A from 1915-50 as "Han's Feed & Grocery Store – country store;" 1950-55 as "Enge's General Store, - grocery, country store;" from 1955-72 as "Sprecker's General Store --- gasoline, country store, hardware, grocery, deli; 1972-82 – Dold's Lawnmower Sales & Service – country store – gasoline, etc.; 1982-88 as "Ridge Country Store – gasoline, country store, grocery, antiques." It lists the use of Building B from 1962-82 as "Scientific Plant Service – Sales of replacement trees and plant

supplies and materials; and from 1982-88 – Dold's Lawnmower Sales & Service – shrubs and tree sales (Christmas trees), plant supplies and materials." According to the Petition, Mr. Dennis Peddy intended to purchase the property and use it "to sell flowers, plants and related materials and supplies," and to "sell ... Christmas trees" seasonally. There was no mention of any intent by Mr. Peddy to sell and service lawnmowers. The petition requested a finding "... that the intended use is in compliance with the [BCZR]" as " a continuation of a nonconforming use."

Zoning Commissioner Haines, in his November 30, 1988 opinion approving the proposed Peddy use, described the original use "loosely described as a Feed and Grocery Store which became a Country Store or General Store over the years." Page 2. A Mr. Griffin and several witnesses testified to the continuity of the operations, including the addition of lawn and garden supplies. These were apparently incidental to the store use. After a lengthy discussion of the law, ZC Haines noted that there had been changes in the use of the site. He wrote, at pages 6-7:

> "The basic operation has remained the same, however, the services have been added to altered somewhat over the years. The lawn mower sales and sevices is a changed, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation.
>
> "There is a refinement in the sense that plant sales and the Christmas tree sales are seen as accessory activities. These accessory activities are seen as an outgrowth of the Lawn and Garden Supply operation. The hardware, deli and gasoline sales have been present on site since prior to January 7, 1945 or have not expanded in the nature or scope of operation.
>
> "There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation [sic] being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site."

At the time, there was no real controversy over Dold's lawnmower operation. Apparently, it was a mild family operation which caused no complaint. Moreover, Peddy did not intend to continue this part of the country store. In this context, there was no specific description

of the nature and extent of the lawnmower sales and service, hours of operation, or impact on the neighborhood. There was no description of the type, size, and scale of the equipment, facilities, or vehicles used. There was no specific description of the type of products. There was no description of the layout of Building B or what occurred there. The site plan gave no specific description of the operation.

The ZC's finding that lawnmower sales and service amounted to a legitimate intensification of the country store was a general conclusion. It was incidental but not central to the finding that Peddy's proposed use for other country store purposes was a legitimate continuation. The most we can gather from the ZC decision is that the Dold operation fit within the original country store framework and was relatively innocuous. There was apparently no contracting, construction, landscaping, or trucking operation. There was no automotive service garage.

The vagueness of the description of the lawnmower sales and service is understandable in the context of the issues presented in 1988. But it is one of the significant contributing factors to the twenty-first century controversy over Mr. Hammond's proposed use. Moreover, with the closing Dold operation having closed in 1988, evaluation of Mr. Hammond's operation depended, in part, on a reconstruction of a description of the Dold operation.

The 2003 CBA Hearing

a. The 1945-Present Country Store and Dold's Operation 1972-88

At the 2003 CBA hearing, the parties focused on a number of issues. These included the history of Mr. Hammond's interaction with the zoning office, the discontinuity of the lawnmower operation, and the perceived noise and other impacts from Mr. Hammond's

proposed operation. There was some description both of the old Dold operation as well as Mr. Hammond's proposed operation, albeit less specific than would be ideal. To this, we now turn.

There was no witness available who could describe the original country store use circa 1945. Robert Dold, however, appeared and described his business from 1972-87 as involving sale and repair of "lawnmowers, chain saws, weed eaters, blowers, different type of homeowners' equipment." T. 77. He said he had and repaired "five different pieces of [lawn and garden] equipment. T. 77-78. He started out in the store and "moved around back," into the building in the back. T. 78. He had a trailer and a truck. T. 79. He also had two air compressors, to remove nuts and bolts and take blades off, and the like. T.82. One was seven horsepower, and the other a five horsepower compressor. T. 82.

Martin Homer, worked with Mr. Dold, said he worked on "other equipment besides mowers, chain saws, tractors, stuff like that. Mowers. Wood splitters." T. 83. He said he used impact wrenches and a compressor. T. 86. Paul Stein described the Dold operation as doing repairs, chain saws, lawnmowers. T. 98-99. He also described how the wood was rotting behind the store.

Barbara Jung testified that the noise produced by the Dold operation was not noisy like Mr. Hammond's operation, at T. 110-11.

> "A. Yes. And the sort of static thing an air compressor does, and once it builds up all its air pressure or not, it's not the constant rumble you get, it's the screeching noise you get from the impact wrenches, or whatever they are. I could only compare it to when I go get my tires changes, that high screeching noise.
>
> "Q. You heard the testimony of Mr. Dold and Mr. Homer, that they had power wrenches there and they normally use power wrenches in repairing the lawnmower equipment, such as equipment you brought?
>
> "A. I heard that, but I will tell you, if I heard them the way I hear Mr. Hammond, I would not have supported them."

In reply to a further inquiry, she added,

"Well, I responded when I called you back. What I said was is thaa I certainly thought the cosmetic things were workable, and he was willing to do that, but I could not agree to him being able to make that noise five days a wek during the hours he said." T. 111-12.

Petitioner Hammond's Proposed Use

Based on Zoning Commissioner Haines' 1988 decision, Petitioner James Hammond stated that lawnmower sales and service was among the uses "... permitted on the site in perpetuity, that there are no time limitations or restrictions on the continuation of the use of the property." T. 31.

Hammond described his total renovation of the store building in the front. T. 35. As to the building intended for lawnmower sales and service, he said, at T. 35-36:

"A. That building was completely rewired including the wires from the pole, completely plumbed. Again, it had to have a terrific amount of demolition.

We had hauled away at least thirty or forty truckloads f debris that was left there by the previous tenant."

"Q. Did you do anything to the electrical system?

"A. Replaced it all in the rear building including ninety percent of the wiring. All the plumbing, basically.

"Q. Is that door new?

"A. I have a roll-up door. They had a kind of makeshift .... A greenhouse on the back of the building, that I removed. It was covering the door, and I replaced it with a door. He had an opening there."

He described his proposed use as sales and service of several brands of lawnmowers, push and riding mowers, chainsaws, weed eaters, and leaf blowers and tillers, a "full line of garden equipment." T. 38. He described the Building B renovations as for a "small engine shop for lawnmower repair." T. 41. He also mentioned a third building, called Building C, a small building for storage of new equipment for sale." T. 45-46.

As he put it,

"Actually, I'm going to make a showroom out of that, and repair done in Building B." T. 46.

He would also use "covered area on the front of the building ... " and an "area behind the building, which is fenced" to place things waiting to be repaired. Ibid.

Mr. Hammond described the proposed hours of operation as 8 A.M. to 5 P.M. Monday through Friday and 9 A.M. to 4 P.M. on Saturday. Bulk mulch would not be sold, just in bags. T. 49. He also proposed screening of the property along the frontage on Falls Road. T. 49-51.

On cross-examination by Ms. Jung, he testified to the use of a forklift to unload new equipment. T. 55. He also has a front end loader to move things about the property. T. 55-56. He planned to buy a trailer to put five or six mowers on in addition to service. T. 56. He described a small one horsepower air compressor in the store for tires and a seven and a half horsepower air compressor in the back building that he uses with power tools. T. 57. He also admitted to having repaired an engine for a large commercial tree-trimming truck, which was there about a month; to repairing several snow-blowers for friends; and to repairing a piece of commercial equipment.T. 57-59.

Upon examination as to Ms. Jung's previous inquiry as to the number of vehicles parked and the appearance of the property, and his response that he "could run a truck facility on the property, he responded, at T. 60:

"A. Not in so many words. I said there had been a trucking facility at the property prior."

As to products, he admitted he had testified that he planned to work on engines of up to 100 horsepower, whereas Mr. Dold had worked on engines up to 20 horsepower. T. 61.

He added that he envisioned having two part-time employees in the lawn and garden business, in addition to an employee in the store, and that he would do the majority of the mechanical work himself. T. 66.

Barbara Jung outlined her concerns about Mr. Hammond's operation:

> "When I supported BobDold in 1988, he was a known quantity." T. 104.
>
> * * *
>
> "But it's just --- I don't know how he can agree to regulate the noise when he's trying to run a business, and I couldn't agree to him making the noise that I hear from coming [sic] there, that I didn't hear from Bob's work." T. 106.

She also pointed out that Mr. Hammond was not responsive "until the authorities got involved." T. 107.

She concluded, at T. 108:

> "The noise is truly the issue. And, you know, we tried to work it out, but I can't agree to hear the noise from eight to five on Saturdays, and some day soon I won't be going to work during the week."

Kim Detrick, who moved to the area in 1992, testified that there were other businesses back there, "but none have produced a fifth of the noise that [she] heard since Mr. Hammond purchased the property." T. 116. She said,

> "My concern with Mr. Hammond is that he's going to be running a service garage and, I mean, we all know that's exactly what he going to be doing."
>
> * * *
>
> "We are not trouble-makers. I never complained about anything that was going on on that property, and I don't want Mr. Hammond to go bankrupt over this whole thing. But that is my home, and it is annoying to have to sit on my front porch and listen to this constant noise, and I don't see how that can stop.
>
> If Mr. Hammond and Mr. Murphy can come up with a way to limit the noise drastically, I think we would be receptive to that. But I cannot think of a way to do it, and that's where we find ourselves.
>
> I think that the opinion that was handed down in 1988 or '87 couldn't be more clear. That gentleman that wrote that opinion was trying to limit this property to not being a service garage so that the neighbors didn't have to listen to the sound of generators and air compressors and lawnmowers and weedeaters and chain saws being tested out, and that's what I think I am going to be looking forward for the net ten years, or however long I have my property." T. 117-18.

On cross-examination, Ms. Detrick underlined that unless there were "very specific guidelines placed on Mr. Hammond, -- I'm not sure he'll do it because --- those two did try to go to him as a neighbor and talk about some concerns that they had, and they weren't addressed, so it does worry me a little bit that, unless specific guidelines are set out for him, that he won't do it." T. 120. She had reviewed guidelines proposed by Mr. Murphy, but found they did not address the noise.T. 121.

Ken Sadofsky, who moved in to the area in 1997, testified to having expressed his objection to Mr. Hammond to "running a full scale operation." T. 125. He was not opposed to a "very, very small scale." He concluded,

> "But then when I am hearing about the full-time regular use business, then I am concerned about the extent, how far that would go, and how much noise it would create, and that's why I am here in opposition." T. 125.

Analysis

This is a very difficult case to evaluate. First of all, we are dealing with a nonconforming use baseline of a modest country store in operation prior to 1945. Secondly, we have the addition of Dold's lawnmower sales and service use, which Zoning Commissioner Haines approved in 1988 as an intensification at the very time that it was going out of business. Thirdly, as it was on its way out, and there had been no neighborhood opposition to Dold's apparently mild accessory business, the Zoning Commissioner did not provide a detailed description of the equipment, products, and vehicles involved, the hours of operation, or noise impact. (ZC Haines did say that there was no construction or contracting equipment, and that the use was not and could not be an automotive service garage.) Fourthly, there was a hiatus of almost 15 years before Mr. Hammond decided to acquire the property and start his new business. Fifthly, and as a result, there are differing opinions as to the meaning of ZC Haines' opinion and the extent of his

approval with respect to lawnmower sales and service. Sixthly, there is the necessity to describe and understand Mr. Hammond's incipient or proposed operation, the nature of any perceived differences between it and the Dold operation, the reasons for neighborhood opposition to the later operation, and the legal significance of such differences. All of this history comes into play against the background of nonconforming use law, the prohibition of expansion or extension of such uses, and the very detailed and specific factual and legal review necessary to reach an accurate conclusion.

To come to the point, let us work backward from Mr. Hammond's activities and proposals. Mr. Hammond is a mechanic who came from outside the neighborhood to establish his own new lawnmower dealership for sales and service at a location where none existed for well over a decade. He began to do extensive renovations, to build a new engine repair facility for the entire Building B and a showroom, albeit small, in Building C. He used forklifts and front end loaders not previously seen. He did repair work on a large tree-trimming truck, snowblowers, and a piece of commercial equipment. His operation, even at the beginning, produced offensive noise not previously experienced in the Dold years. He stated his intention to work on machines of up to 100 horsepower, whereas Dold had worked on 20 horsepower machines. He would have two part-time employees, whereas the Dold operation was all in the family. He asserted in writing that there are "no time limitations or restrictions on the continuation of the use of the property" for lawnmower sales and service. On the other hand, he said his equipment, such as the compressors and other tools, would be comparable in horsepower to those used by Dold.

All of this produced new noise impacts offensive to some nearby area citizens, both those who lived there during the Dold years, such as Mr. Jung, and newcomers such as Ms. Detrick

and Mr. Sadofsky. To be sure, Mr. Hammond had supporters, who appreciated his personal help from time to time. But even he seemed to acknowledge some merit to citizen complaints, in that he proposed screening to insulate the site to some extent.

Where then does this lead in the universe of nonconforming use law? It must be kept in mind that the burden of proof is on the property to demonstrate the legitimacy of a proposed nonconforming use. How, therefore, on this record can it be said that Mr. Hammond's actual activities and proposals are comparable to the Dold operation? How can we say that it fits the boundaries of legitimacy set in Jahnigen and McKemy? Does this record not show, at the very least, the "creeping" type of expansion warned against in Phillips, if nothing more?

As Anderson says, in Section 6.47, concerning addition or expansion of facilities:

> "The addition of new facilities or the enlargement of existing ones seems most likely to be regarded as an extension of use if the nonconforming use is there rendered more incompatible with permitted uses, if the volume or intensity of use is increased, or if the nature of the use is substantially changed."

There are a number of examples of illegal extensions given in footnotes 92-94, of which these are a sample: the erection of poles and lights along a nonconforming drag strip; construction of a garage to house 18 wheel vehicles in connection with a nonconforming cesspool business; construction of an inspection bay in connection with a nonconforming gasoline station; storage tanks replaced with tanks double the size of old ones; nonconforming tailor shop converted to fully mechanized cleaning and dry-cleaning establishment. On the other hand, the following are given as examples of allowable intensifications: replacement of steam engines with internal combustion engines; addition of a pneumatic tube system by a bank; substitution of a digging machine for the hand digging of sand; installation of a rock crusher at a quarry.

Is there proof that Hammond's new engine repair facility and showroom substantially replicates the Dold facility? Is it no more incompatible than the Dold facility? Is it at a similar scale? Is the nature of the use substantially the same?

Anderson also points out, in Section 6.48, with respect to extension to new parts of a building:

> "Where a use was established in part but not all of a building prior to the enactment of a restrictive ordinance, the right to continue the use may not include the right to extend it to other parts of the building."

Citing the Phillips case, Anderson tells us that:

> "Some ordinances restrict nonconforming uses to the land or floor space occupied by the use when the restrictive ordinance was adopted."

To be sure, BCZR 104.3 states:

> "No nonconforming building or structure and no nonconforming use of a building, structure or parcel of land shall be extended more than 25% of the ground floor area of the building so used."

Is there proof that Hammond's proposed uses of the entire Buildings B and C squares with the area used by Dold, or limits the increase to 25% of the ground floor area? Does the record show specifically what parts of Buildings B and C were used by the Dold operation? The 1988 site plan simply shows an outline of these buildings. There are various indications in the 1988 opinion and in the testimony that Building B was used by Dold for sales and service, but there is no specific identification of an area used by Dold as a "repair facility" comparable to that proposed by Hammond. With respect to Building C, there is an indication in the 1988 opinion that Dold used it for storage, but not for a showroom.

Anderson sequentially observes, with respect to new activity, produce, or service, in Section 6.49:

"The right to continue a nonconforming use does not include the right to expand it through the addition of a new product or service."

The examples given in footnotes 17-21 reflect the care with which courts examine the introduction of new products, processes, and services in order to guard against a change in the character of the use.

Having explored these several consideration, what conclusions can fairly be asserted on this less than ideal historic record? It seems that Mr. Hammond took the 1988 approval of Dold's lawnmower sales and service use as a virtual *carte blanche* to use the property without restriction as to facilities, equipment, area, products, and hours, so long as he could call it by the name "lawnmower sales and service." He also took Mr. Moxley's reference to the uses approved in the 1988 decision as an unbounded permission. Unfortunately, Mr. Hammond did not appreciate the limitations and boundaries set by nonconforming use law, of which there is ample indication in ZC Haines' 1988 opinion.

He then began renovations and some limited operation in such a way as to alarm some of the neighbors. This litigation followed. On this record, however imperfect, it appears to us more probable than not that the neighbors had legitimate concerns that Mr. Hammond, by virtue of both his acts and stated intent, had in mind what amounts to an expansion of the original nonconforming use, and something different in character than the Dold operation. If not for this litigation, there is the potential, if not the probability, that the use would be much more incompatible than Dold's use. Moreover, it would not merely be a byproduct of intensification or increase volume.

A Middle Road?

The proposed settlement proffered on February 28 represents a kind of search for a middle road. For reasons already stated, the parties cannot just "settle" a zoning case governed

by public law. Consistent with the Attman case, the CBA's obligation is to make findings of fact and conclusions of law with respect to the task assigned on remand.

In this context, is it nevertheless possible on this record to find a middle road consistent with law? To do this, the CBA would have to determine and define specifically the limits or parameters of a permissible nonconforming use substantially equivalent or comparable to the Dold operation? In other words, can the CBA take what amounts to a middle position to allow Mr. Hammond some limited use within the boundaries of the allowed Dold "intensification," but not the unrestricted use to which he, Mr. Hammond, has consistently claimed entitlement?

In order to come to such a conclusion, the CBA must feel confident that it can describe with specificity the character and extent of the Dold operation – the scale, size and/or type of area, facilities, equipment, products, and hours of operation. It then would have to place conditions on Mr. Hammond's use so as to confine it substantially to those specific boundaries. The CBA must be confident that the conditions are sufficiently specific to guard against the property owner's utilization of a limited approval as a springboard or excuse for further growth of the commercial use. This would just invite a repeat of the litigation brought about by his broad interpretation of the 1988 approval.

It is unclear whether or not it would be helpful to have additional examination or testimony in depth as to the Dold operation and the equivalency of proposed limits on Mr. Hammond's operation. Because of the uncertainties in the record, this could be considered. To be sure, this may prove unproductive because of the lapse of time. Unfortunately, in the unusual circumstances of this case, it is extremely difficult to frame a decision to recapture or revive an "intensification" of a nonconforming use abandoned many years ago.

We leave the rest to the County Board of Appeals to exercise its judgment and wisdom in accordance with the law.

Peter Max Zimmerman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 2006, a copy of the foregoing People's Counsel for Baltimore County's Remand Memorandum was mailed first class mailed, postage prepaid to Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030 and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201,Attorney for Petitioner.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

ANDERSON'S AMERICAN LAW OF ZONING 4th Edition

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BOARD OF APPEALS

WS Falls Road, 2200 ' north of Broadway Road (11942 & 11950 Falls Road) 8th Election District – 3rd Councilmanic District Legal Owner: James G. Hammond	* * * * * * * *	BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 03-366-SPH

****

MEMORANDUM

James G. Hammond, Petitioner, by his attorney, John C. Murphy, submits this Memorandum following the hearing on February 28, 2006

AGREEMENT TO SETTLE AND CASE HISTORY

Mr. Hammond submitted a signed stipulation(attached) providing for the use of the property, including permissible uses, hours of operation, and its improvement by landscaping. The neighbors, represented by Barbara Jung, had agreed and signed the settlement agreement. The People's Counsel objected. Mr. Hammond is willing to abide by the terms of the stipulation. He has never started his business. The noise and other matters which the neighbors complained of were due to his work in renovating the buildings to get them in shape to start. He has never started his business. He is willing to abide by the safeguards built into the stipulation. He asks that he be allowed to demonstrate that he can conduct a lawful business of lawn mower sales and service in the same manner that the property was used for this very same business from 1972 to 1989.

One cannot ignore the facts of this case. Mr. Hammond made inquiry in early 2001 how he could obtain assurance that lawn mower sales and service was

allowed on the property which he was then considering purchasing. He was advised to write the County a "spirit and intent" letter and send a check which he did. His letter is attached, asking the County to advise him if he could operate a lawn mower business. He received the attached letter dated April 20, 2001, advising him that "lawn mower sales and service" was allowed. The County relied on a 1988 ruling of Zoning Commissioner Haines that lawn mower sales and service was a reasonable intensification of the non conforming use of the property for a country store. The Dolds had conducted a lawn mower sales and service business on the property from 1972 to 1988.

Based on this assurance, he signed a contract to purchase the property for $250,000.00 in October 2001 and subsequently settled. He worked on the property getting it in shape in 2002 and was ready to start the lawn mower sales and service business in December 2002. The Board observed in its decision that it was "not unreasonable" for Mr. Hammond to rely upon the County assurances.

Then after he had settled and worked on the property for more than a year, he was advised by the County to apply for a special hearing if he wanted to repair all types of lawn mowers, not just those previously purchased on the property. He went to the Zoning Commissioner for a clarification and this resulted in a decision that the use was limited to lawn mowers previously purchased on the site. Then he appealed to the Board of Appeals, which held that the non conforming use was lost entirely since it had ceased and that the Board could not consider the estoppel issues. All three of these decisions were reversed by the Court of Special

Appeals—the repair of lawn mowers was not limited to lawn mowers previously purchased; the non conforming use had not ceased; and the Board could consider estoppel.

At this time, Mr. Hammond has a very simple request. He asks that he be allowed to establish the lawn mower business with the restrictions set forth in the attached stipulation signed by Ms.. Jung on behalf of the neighbors. He is not asking the Board to accept the stipulation as settling the case, which is apparently impossible because of the Peoples Counsel's objections, but to incorporate the restrictions into a final order. In this way the Board can be assured that the use will be conducted in a way compatible with the neighborhood. In particular, Mr. Hammond is willing to undertake extensive landscaping efforts to improve the appearance of the property. The property has been in a state of limbo for the last three and a half years because of the pending hearings and trials.

For three and a half years, through two administrative hearings and two court hearings, Mr. Hammond has been unable to use the property for lawn mower sales and service. He has been unemployed, This has had a devastating effect on him. Mr. Hammond asks for approval by the Board to bring this matter to an end so that he can commence business in accordance with the protections built into the stipulation. He asks to be given the chance that he can operate his business in a way not harmful to the neighborhood.

ARGUMENT

The Use is the Same As Previously Existed and Approved

The basic legal reason for approval is that the use is the same as existed on the property from 1972 to 1988 and was previously approved by Commissioner Haines. The basic legal fact is that there is a non conforming use on the property for a country store including "hardware" and "garden supplies and equipment", see decision by Commissioner Haines dated November 30, 1988, p. 7..
This non-conforming use for a Country Store was specifically upheld by the Court of Special Appeals.

The question then becomes whether lawn mower sales and service should be allowed as a reasonable intensification of the non conforming use or because it was previously approved. The Court of Special Appeals held that the Board has to consider whether the use is an intensification of the original non-conforming use. Opinion, p. 44.

Dold's lawn mower sales and service operated on the property from 1972 to 198. The 1988 Haines decision did not describe this use other than to say it was lawn mower sales and service. This Board received testimony from three witnesses who were familiar with the Dold operation. Robert Dold testified:

"We sold and repaired lawnmowers, chain saws, weed eaters, blowers, different types of homeowners equipment" (p. 77)

Mr. Dold testified that they picked up the equipment "with a truck and trailer"(79), used two air compressors (82).

Martin Homer was an employee of Dold's for nine years and recalled,

"We worked on mowers that came in, mowers he sold, new ones. Whatever we picked up, we worked on. There was other equipment besides mowers, chain saws, tractors, stuff like that. Mowers. Wood splitters". (85).

Homer testified the operation used an air compressor and impact wrenches. (86).

Paul Stein testified that Dold's repaired chain saws and mowers, and occasional odd jobs. (99).

Hammond's testimony was that he wanted to sell and lawn and garden equipment, like lawn mowers, chain saws, weed eaters, leaf blowers and tillers. He would use a compressor for removing wheels and blades, 41, and a forklift to remove equipment that came in, 55.

This is not a complicated subject. The Dolds operated a lawn mower sales and service operation from 1972 to 1989. Hammond proposes to re-establish the same operation.

The basic test in Maryland for a non-conforming use is that the use may continue and be intensified as long as the "nature and character" of the use is unchanged and "substantially the same facilities are used are used". Wilson v. Elkton, 35 Md. App. 417 (1977). In McKemy v. Baltimore County, 39 Md. App. 257, 269 (1978), the court established a four part test including for determining intensification:

1. Current use as opposed to the nature and purpose of the original non conforming use;

2. Whether the current use is merely a different manner of using the original use, or whether it is different in "character nature and kind"

3. Substantially different effect on the neighborhood;

4. Whether the current use is a drastic enlargement of the original non conforming use.

Commissioner Haines conducted a careful review back in 1988 applying these tests and concluded that a lawn mower sales and service was a permissible intensification of the original country store use. He was undoubtedly correct. Other cases which have held uses to be permissible intensifications of non conforming uses are an increase in the number of trucks stored on property, Carroll County v. Zent, 86 Md. App. 745 (1991); change from a facility for treating alcoholics and the elderly to a facility for the retarded, Kastendike v. Baltimore Ass'n for Retarded Children, 267 Md. 389 (1972); change from dairy business to riding academy, Parr v. Bradyhouse, 177 Md. 245 (1939).

There is a second reason which goes under the name of administrative res adjudicata, as explained by the Court of Special Appeals, that to a certain extent, prior administrative decisions are binding the same way prior judicial decisions are. Opinion, p 46. As explained by McKemy in discussing the prior ruling in that case,

"Both findings, we have stated, were supported by the record and should not be questioned now". McKemy, 39 Md. App. 269.

Thee is a common sense standard applicable here. A lawn mower business is a lawn mower business, whether operated by Dold or Hammond. Back in 1988, the County through Commissioner Haines issued a ruling that the lawn mower business was allowed as a permissible intensification. As the facts recited above indicate, the Dold's business and the business proposed by Mr. Hammond are essentially the same. Any lawn mower business will change over the years, lawn mowers themselves change and accessories like weed eaters, which Dold's also sold, or horsepower.

Mr. Hammond deserves to be given the chance that he can conduct the same business that operated for 17 years without objection. It is inherently unfair to declare him guilty before he has even started. Any use can probably be conducted in a way offensive to the neighborhood. But Mr. Hammond will not do this and, moreover, is willing to abide by the restrictions stated in the stipulation.

Applying the test of the cases, the use of the country store for a lawn mower sales and service operation is a reasonable intensification of the country store, just as Commissioner Haines held. Keep in mind that the country store non conforming uses included hardware and lawn and garden equipment. A lawn mower sales and service operation is the same "nature and character " as the other uses one associates with a country store. Hardware stores and lawn and garden stores all over the State sell and repair lawn mowers and related equipment.

The Court of Special Appeals also said that administrative rulings are binding when they involve identical uses. The Hammond operation is identical to what the Dold's were doing. A citizen has to be able to rely on rulings. Obviously Mr. Hammond purchased the property in reliance on the Haines ruling, as conveyed to him by the County, that a lawn mower sales and service operation was ok. There is no real basis for the Board to now say it is not ok before it has even started. If in fact the use is conducted in a way offensive to the neighborhood, then remedies exist. The proposed stipulation specifically prohibits this. But Mr. Hammond cannot be declared guilty before he even starts.

HAMMOND CAN OPERATE THE BUSINESS BY VIRTUE OF ESTOPPEL

The Court of Special Appeals directed the Board to consider estoppel in the event it found that the proposed use was not otherwise permissible. The Court described estoppel as being "used to achieve equitable results in zoning disputes between the government and its property owners", Opinion p. 54, citing Sycamore Realty v. People's Counsel, 344 Md. 57, 63 (1996). In a recent case, the Court of Appeals said:

"Equitable estoppel is composed of three basic elements: 1) a voluntary representation of one party, 2) that is relied on by the other party, 3) to the other party's detriment". Reichs Ford Road Joint Venture v. State Highway Administration, 388 Md. 446 (2005), citing Creveling v. Gov't Employers Ins. Co., 376 Md. 72 , 102 (2003).

Here the County held out a service to its citizens, charging a fee. Hammond clearly informed the County that he was intending to purchase the property and relying on the County; and Hammond clearly suffered as a result. This is not a clear mistake as to a clerk informing a citizen about the zoning, rather it is a matter of interpretation. The People's Counsel claims that Mr. Hammond intentionally bypassed the hearing process. This is a terribly unfair accusation to make against a county citizen. Mr. Hammond did all that a reasonable citizen could do, he asked for guidance from the County and was informed of the spirit and intent letter process. Maybe that is the County mistake, not informing Mr. Hammond that he should have requested a special hearing, or that he should not rely on the letter from the County. But Mr. Hammond is the citizen holding the bag as a result of the County mistake,. This is unfair and the estoppel doctrine addresses this unfairness.

CONCLUSION

Mr. Hammond asks the board to accept the proposed lawn mower sales and service as essentially the same use as was approved before and conducted without harm to the neighborhood. In the Board's discretion, apply the safeguards set forth in the stipulation to insure that in fact there will be no adverse effect.

Respectfully submitted,

John C. Murphy
516 N. Charles Street, Suite 206
Baltimore, Md. 21201
410-625-4828

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 29 day of March, 2006, I mailed a copy of the foregoing Motion to Barbara Jung, Esq., 11939 Falls Road, Cockeysville, Md. 21030 – 1606, and to Peter M. Zimmerman, Esq., People's Counsel, County Office Building, Towson, Md. 21204.

John C. Murphy

In the Matter of	*	County Board of Appeals
James G. Hammond	*	of Baltimore County
11942 and 11950 Falls Road	*	Case No. 03-366-SPH
8th E, 3rd	*	

STIPULATION

The parties to this matter, namely Barbara Jung and James G. Hammond, have reached agreement and present their agreement to the Board of Appeals of Baltimore County by way of this stipulation. The parties request that the terms of this agreement be set forth in an Order of the Board of Appeals to be applicable to the present owner of the property, James G. Hammond, and to any future owners.

The use of the property at 11942 and 11950 Falls Road for lawn mower sales and service shall be subject to the following restrictions:

1. Compliance. There will be compliance with all rules and regulations as enforced by Baltimore County Code Enforcement, Health Department and Department of the Environment. There will be compliance with the Order issued by Zoning Commissioner Haines in Case No. 89-SPH 204, except as noted below. There will be no contractors or construction companies, landscaping or trucking operations, or automotive repair facility on the property. The store will comply with all rules and regulations concerning the service of food and will acquire all applicable permits.

2. Use. The property may be used for the sale and repair of the following:

Weed eater
Chain saw
Leaf blower
Garden tiller
Chipper shredder
Portable generator
Walk behind mower
Riding tractor
Zero turn mower.
Related equipment (ie, hedge trimmer)

The present maximum horsepower of the above equipment ranges from 2.3 horsepower for a weed eater to 31.0 horsepower for a zero turn mower. The parties

James Hammond
1517 Applecroft Way
Cockeysville, MD 21230
Telephone: 410-252-0782

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

RE: Recertification / Clarification of Non-Conforming Use (SPH #89-204)

Property Owner: Mr. And Mrs. Robert E. Dold
Property Location: 11948 Falls Road, Cockeysville, MD 21030
Identification: Tax Map 50, Grid 24, Parcels 267 and 297

Dear Mr. Jablon,

As directed by your office, I am submitting this Letter of Spirit and Intent in order to clarify and re-establish the non-conforming use certification of the above referenced property. I am currently working with the property owner in a transaction involving the property.

The rear 900sf building was formerly approved and used for a lawn mower sales and service operation. Subsequently, the building has been used as a gift shop. I propose to reestablish the lawn mower sales and service operation and continue the additional uses listed below. I would also like assurance that, in the event the building is destroyed, the improvements may be rebuilt.

On April 6, 2001, I reviewed the Decision and Order rendered for the Special Hearing (SPH 89-204) and consulted with the planners on duty that day. Based on the information provided, it is my understanding that the following uses are permitted on the site in perpetuity, i.e., that there are no time limitations or restrictions on the continuation of the uses as approved by the Decision and Order:

1] Lawn mower sales and service
2] Plant and tree sales and Christmas tree sales
3] Gasoline sales
4] Deli / convenience store
5] Gift shop

I request from your office a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses. Also, please provide a discussion of the owner's property rights in the event of destruction of the improvements as well as the proper procedure for rebuilding following such an unlikely event.

IN THE MATTER OF: * BEFORE THE

THE APPLICATION OF * COUNTY BOARD OF APPEALS

JAMES G. HAMMOND - LEGAL OWNER/ * OF

PETITIONER FOR A SPECIAL HEARING * BALTIMORE COUNTY

ON PROPERTY LOCATED ON THE W/SIDE* Case No. 03-366-SPH

OF FALLS ROAD, 2,200' NORTH OF * June 25, 2003

BROADWAY ROAD (11942 and 11950 *

Falls Road) *

8th ELECTION DISTRICT *

3rd 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 25, 2003.

* * * * *

Reported by:

C.E. Peatt

EXHIBIT B

IN RE: PETITION FOR SPECIAL HEARING
WS Falls Road, 2200' NW
Broadway Road
(11943 & 11950 Falls Road)
3rd Councilmanic District
8th Election District
Legal Owner: Robert Dold,
Contract Purchaser:
Dennis Peddy

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* CASE # 89-204 SPH

****

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses; namely, Barbara Jung, Mr. Louis J. Pucci, Mr. and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales.

DATE 11/29/89 BY

ORDER RECEIVED FOR FILING

2/28/06

In the Matter of	*	County Board of Appeals
James G. Hammond	*	of Baltimore County
11942 and 11950 Falls Road	*	Case No. 03-366-SPH
8th E, 3rd	*	

STIPULATION

The parties to this matter, namely Barbara Jung and James G. Hammond, have reached agreement and present their agreement to the Board of Appeals of Baltimore County by way of this stipulation. The parties request that the terms of this agreement be set forth in an Order of the Board of Appeals to be applicable to the present owner of the property, James G. Hammond, and to any future owners.

The use of the property at 11942 and 11950 Falls Road for lawn mower sales and service shall be subject to the following restrictions:

1. Compliance. There will be compliance with all rules and regulations as enforced by Baltimore County Code Enforcement, Health Department and Department of the Environment. There will be compliance with the Order issued by Zoning Commissioner Haines in Case No. 89-SPH 204, except as noted below. There will be no contractors or construction companies, landscaping or trucking operations, or automotive repair facility on the property. The store will comply with all rules and regulations concerning the service of food and will acquire all applicable permits.

2. Use. The property may be used for the sale and repair of the following:

Weed eater
Chain saw
Leaf blower
Garden tiller
Chipper shredder
Portable generator
Walk behind mower
Riding tractor
Zero turn mower.
Related equipment (ie, hedge trimmer)

The present maximum horsepower of the above equipment ranges from 2.3 horsepower for a weed eater to 31.0 horsepower for a zero turn mower. The parties

recognize that the horsepower of the products identified above may increase consistent with the normal development of these products; provided however, that no equipment of a greater horsepower than listed above shall be repaired on the site if it results in a discernible increase in noise levels.

All work on engines shall be done inside the rear building or between the rear building and the store and when air driven tools are used, the work will be done inside with the overhead garage door closed.

No mowers and equipment, whether new or used, shall be stored on the open lot to the south of the buildings or on the front lot of the store, but will be kept in the area between the back building and the front store. Up to three new mowers my be displayed in the front.

No vehicles, whether tagged or not, shall be stored on the property. The only vehicles permitted on the property shall be those of customers and employees during working hours.

3. Hours. The hours of operation shall be limited to 8:00 a.m. until 5:00 p.m. on week days and 9:00 a.m. until 4:00 p.m. on Saturday. There will be no motorized work on Sundays.

4. Disposal and storage. The operation shall contract with a State certified professional company for the collection, storage and removal of gas, oil and any other chemical, hazardous and toxic wastes that accumulate from the engine repair business and the contract shall be available for inspection. All rules and regulations of the Baltimore County Department of the Environment and the Maryland Department of the Environment regarding the operation and maintenance of gasoline tanks shall be followed.

5. Maintenance of the property.

a. Within nine months following the entry of an order pursuant to this stipulation, the owner shall erect an 8' stockade fence around the barn and the buildings in the back of the property, installed to professional standards; screen the front of the parking lot on the south side of the property with evergreen trees; and remove all junk, stumps, debris, lumber and other non-affixed items from the lot on the south side of the building and no such items shall be permitted in the future.

b. The exterior of the buildings shall be maintained even if unoccupied;

c. No additional overhead lighting in the rear of the building or around the store shall be installed; no neon signs shall be installed.

d. The operations on the property shall be conducted in a way that does not disturb the residents surrounding the property.

6. Re-classification. James G. Hammond, for himself only, agrees not to request zoning reclassification of the property so long as he owns the property.

7. Enforcement. The parties request that the terms of this stipulation shall be embodied in an order issued by the Board of Appeals and that the Order shall provide that its terms shall be enforced by Baltimore County.

IN WITNESS WHEREOF, the parties consent to this stipulation this 28 day of Feb, 2006.

WITNESS:

BARBARA JUNG

JAMES G. HAMMOND

Hammond-stipulation

2/22/06

RE: PETITION FOR SPECIAL HEARING 11942 & 11950 Falls Road; W/S of Falls Road, 2,200' N of Broadway Road 8th Election & 3rd Councilmanic Districts Legal Owner(s): James G. Hammond Petitioner(s)	*	BEFORE THE COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY 03-366-SPH

RECEIVED
FEB 22 2006
BALTIMORE COUNTY
BOARD OF APPEALS

People's Counsel for Baltimore County's Remand Memorandum

I. The Remand

This case began with James Hammond's Petition for Special Hearing filed on February 10, 2003 to "approve the clarification that lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site and to amend the prior orders in Case # 89-204-SPH and 94-14-SPH, if necessary. The case proceeded through the Zoning Commissioner (ZC), County Board of Appeals (CBA) – *de novo*, Circuit Court on judicial review, and to the Court of Special Appeals (CSA) on appeal. It is back at the CBA on remand. Two of the three CBA panel members who participated in the 2003 proceedings and signed the October 27, 2003 CBA opinion have since left the CBA. Therefore, two new members must be assigned to review the record and continue on with the case. See People's Counsel v. Country Ridge Shopping Center 144 Md. App. 580 (2002). The CBA has discretion to decide the case based on the existing record or to take additional evidence that will be helpful to the decision.

II. Scope of the Remand

The CSA issued its remand opinion on November 15, 2005. It presents significant issues of public importance relating to the law of nonconforming uses, estoppel, and vested rights. We distill from Judge Eileen Hollander's three significant issues: the nature and extent of the proposed change to the nonconforming country store use: permissible intensification or

impermissible extension; the relevance or applicability of the "estoppel" doctrine; and the relevance or applicability of the law of "vested rights."

III. Summary of The Nonconforming Use Issue

The first issue is the issue raised directly by the Petition for Special Hearing. It concerns a determination of whether Petitioner's proposed use of the property for lawnmower sales and service to the general public, including engine repair facilities in Building B, fits within the scope of the established nonconforming use for a country store. In this context, the CSA concluded that Zoning Commissioner Robert Haines' 1988 decision in Case 89-204 approving the accessory use of "*lawnmower sales and services*" functioned to allow an "intensification" of the nonconforming use, so that subsequent abandonment or discontinuation of such sales and service did not terminate the nonconforming country store use. The opinion also observed (page 51) that the part of the order which allowed lawnmower sales and service did not forbid service provided to lawnmowers purchased elsewhere.

At the same time, the nub of the remand is Judge Hollander's explanation and finding that it does not necessarily follow that Petitioner Hammond's use must be approved as a reincarnation of the earlier use. She rejected Hammond's contention that the principles of "*res judicata*," "collateral estoppel," or "claim preclusion" require approval of Hammond's use. Comparing the proposed use with the earlier use, identified (CSA opinion, page 7) as "Dold's Lawnmower Sales and Service" in conjunction with "Ridge Country Store," Judge Hollander wrote, at page 46:

> "Even if we agreed with appellant's construction of the Haines Decision, we hasten to add that it is not at all clear that the business that was the subject of the Haines Decision is, indeed, identical to appellant's proposed business. In deciding whether the Haines Decision is entitled to preclusive effect, that issue looms large"

Because Hammond's proposed use may differ from the earlier use both as to the scope of operation, the extent of facilities involved, and the impact on the neighborhood, there is a substantial question as to whether the proposed use goes beyond intensification and amounts to an "extension" of the original nonconforming country store. As her opinion explains, the law governing nonconforming use disallows "extensions" of such uses.

The main task which the appellate court has assigned to the County Board of Appeals on remand is thus to make findings of fact and conclusions of law regarding the extent to which Hammond's proposed lawnmower sales and service use and facilities departs from the original country store use in spirit, intent, function, and impact. If the CBA judges that the proposed use fits reasonably within the essential nature of the country store use, then it would be a legal intensification. If it does not, then it would be an impermissible extension or expansion.

IV. Summary of Estoppel and Vested Rights

The second and third issues concern estoppel and vested rights. The Petition for Special Hearing did not raise these issues. Nor is there any mention of them in the Deputy Zoning Commissioner's April 11, 2003 Opinion. So far as we can tell from the record, Petitioner raised them for the first time at the CBA, which declined to address them on broad jurisdictional grounds. A better reason to decline these issues would have been that Petitioner failed to assert them in issue in the Petition for Special Hearing.

Our office wrote to the CBA on the nonconforming use issues on June 11, 2003. Had we known then that estoppel and vested rights were contested, our office would have addressed them at that time, consistent with the office's activities in past litigation. Sycamore Realty Co. v. People's Counsel 344 Md. 57 (1996); Marzullo v. Kahl 366 Md. 158 (2002); Antwerpen v. Baltimore County 163 Md. App. 194 (2005). In any event, the CSA has instructed the CBA to

resolve these issues, which are important to zoning law generally. We appreciate the opportunity to address them now and shall show that Petitioner's belated assertions are without merit.

Petitioner Hammond's claims of estoppel and vested rights seek to establish defenses against and avoid enforcement of the law against an otherwise illegal use. The appellate court opinion states at page 54:

> "Without a ruling from the Board, we are unable to conduct our judicial review function. Therefore, on remand, in the vent that the Board determines that appellant's business is not a lawful intensification, it should proceed to address appellant's estoppel and vested rights contentions, and determine whether they apply here to protect appellant."

Appellant bases his claims on Commissioner Haines' 1988 decision in combination with the subsequent "spirit and intent" letter issued by zoning staff member Lloyd Moxley on April 20, 2001 to approve Mr. Hammond's request to "reestablish the lawnmower sales and service operation." Mr. Moxley's letter referred to the earlier Zoning Commissioner decision in Case No. 89-204-SPH as having "*...approved the following non-conforming use on said property, country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale.*"

Judge Hollander provided a helpful summary of Petitioner Hammond's contentions, at pages 51-52. She wrote:

> "Appellant contends that he "is entitled to the use by reason of vested rights or estoppel," because "of the change in the County's position." He asserts:
>
> > 'The Haines ruling clearly held that lawn mower sales and service was permitted under the aegis of the country store use. The subsequent decision of the Board of Appeals and the Circuit Court held, contrary to the Haines ruling, that the lawn mower sales and service was a separate non-conforming use and lapsed if not used. The Moxley letter constituted a written determination that the lawn mower sales and service was permitted without any qualifications. Then, after a community group raised objections, Moxley changed his mind and advised that only lawnmowers purchased on the site could be repaired. The Board of Appeals went far beyond the Moxley change of mind and held, contrary to the Haines ruling and the Moxley letter, that the use had expired.

> Hammond's acquisition of the property and a year's worth of work did not take place in a vacuum. He relied on Moxley's letter. And Moxley himself did not just sit down and dream up his response. He in turn relied on the Haines ruling, particularly the order which he literally re-stated.'
>
> According to appellant, "where a [zoning law] change occurs, persons who have ... relied on the prior zoning by obtaining a permit and doing work in reliance on that permit are protected . . . by the Maryland law of vested rights/estoppel." He also maintains that he has vested rights in the lawn mower sales and service business because of the substantial construction that he undertook. In particular, he points out that he "replaced electrical and plumbing, put in a roll down door, haul away 30-40 truckloads of demolition materials, and removed the greenhouse." As Hammond points out, appellee conceded as much, agreeing that Hammond "'worked like a dog' to get the place ready."
>
> In a related argument, appellant contends that the doctrine of "estoppel" applies here. Apart from his reliance on Moxley's assurances, he states: "Since Haines had the authority to make the ruling, the correct zoning was as set forth in his ruling, up until the time a different ruling was made by the Board of Appeals. The zoning was changed. All the elements are there for the application of vested rights/estoppel."

Petitioner's estoppel and vested rights claims are based on the same set of facts and directed to the same objective. But they involve different theories, as Judge Hollander also recognized at pages 54-55 of her opinion. For different reasons, both of these claims must fail.

The objections to the estoppel claim are both factual and legal. The doctrine of estoppel, as the appellate opinion says (page 54), involves a "theory of equitable estoppel applied in the context of zoning disputes." In this connection, "[I]t is used to achieve equitable results in zoning disputes between the government and its property owners." It is a "legal defense," but, as Judge Hollander recognized, citing Relay Improvement Assoc. v. Sycamore Realty Co. 105 Md. App. 701, 723 (1995), aff'd *sub nom* Sycamore Realty Co. v. People's Counsel for Baltimore County 344 Md. 57 (1996):

> "The Court explained that the Court of Appeals has 'applied the doctrine of equitable estoppel in the context of zoning matters' only 'rare occasions ...."

The more recent decision of Marzullo v. Kahl 366 Md. 158 (2001) reiterates that the estoppel doctrine does not, as a rule, apply to allow avoidance of zoning law based on reliance of

mistaken information or even permits issued by officials. In brief, the law charges persons dealing with public officials with knowledge of the law and the extent of their authority. Moreover, the law does not allow public officials to give away the legal rights of the public whether intentionally or by mistake. Petitioner Hammond's estoppel claim thus must fall to the principle that estoppel does not apply against the public. As a corollary, Hammond may not avoid the law to the detriment or prejudice of interested citizens in the neighborhood.

Even if an estoppel theory were available to Hammond, moreover, the facts here would not justify its application. A careful review of Hammond's letter to the zoning office and Moxley's reply reflects that the apparent approval was limited to the resumption of the lawnmower use approved in Commissioner Haines'1988 decision. To the extent that Hammond's proposed use differs from the earlier use, the Moxley approval does not purport to cover it or give any assurance.

The objections to the vested rights claim go to Hammond's fundamental misapplication and misconstruction of the law of vested rights. Judge Hollander wrote, at page 55 here:

> "The related doctrine of vested rights is "derived from principles of common and constitutional law...." Sycamore Realty, 344 Md. at 67. It provides that "a landowner may rely on nothing other than a property-issued permit, and that a substantial change in circumstances will not be found unless the landowner begins actual, above-ground construction."

If a property owner properly acquires vested rights, then he would be protected from a change in legislation which otherwise would prevent his proposed use.

Here, if the CBA finds that Hammond's proposed use is an illegal extension of the original nonconforming use, and if Moxley's letter is construed as the approval of such an illegal extension, then it would be an invalid approval. Moreover, Moxley's letter does not have the legal status of a building permit, which is issued after a process of review by various agencies. It is merely one zoning official's opinion and can hardly serve as the premise for vested rights.

Moreover, the county's subsequent determination that Hammond should file for a special hearing was not a change in the law. Rather, it was a recognition that there are serious legal questions as to whether Hammond's proposed use is actually a permissible "reestablishment" of the earlier nonconforming use, however intensified by Dold, or whether it crossed the line of impermissible extension. In demanding that Hammond file a petition for special hearing, the County was essentially providing the opportunity for a public hearing and procedural due process of law to establish whether or not Hammond's proposal is legitimate. Indeed, when a property owner places the legality of his use in litigation by petition for special hearing, it functions as an acknowledgement that no vested rights exist as a matter of law. This is settled by the recent case of Antwerpen v. Baltimore County 163 Md. App. 194 (2005); see Powell v. Calvert County 368 Md. 400 (2002).

V. The Nonconforming Use Issue in Depth: A Nonconforming Use Terminates If Changed or "Extended"

a. The CBA's October 27, 2003 Opinion (Hammond I)

The Hammond I opinion stated on page 1 that "the facts and chronology of this case are uncontroverted by the parties." It recited the "country store" use which predated zoning and described the operation under the ownership of Robert and Nancy Dold from 1972 to 1988 as "including a lawnmower repair shop." This led to the 1988 zoning controversy and the opinion by Zoning Commissioner Haines, which confirmed the nonconforming use, but, in the CBA's view, on page 2, "... limited repair services only to those machines actually sold on the site." It was the CBA's errant construction of this limitation as an essential element of the nonconforming use, rather than a mere "intensification," which required the remand.

Hammond I went on to underline on page 2 petitioner's April, 2001 letter, in which Hammond asked the PDM Department for a letter of spirit and intent to "clarify and **reestablish**

the nonconforming use certification of the above-referenced property." (emphasis in original). It observed in early 2003, prior to Hammond's "starting once again to sell and repair lawnmowers ...," the community association made him aware of that there was a controversy. The County Zoning Office, moreover, issued a violation notice. There followed Hammond's request for this special hearing to clarify and legitimize his proposed use.

The CBA then proceeded on pages 3 and 4 to a discussion of nonconforming use law, the BCZR 101 definition, BCZR 104.1, and the case of Prince George's County v. E.L. Gardner 293 Md. 259 (1982). In this context, it found that the lawnmower sales and service use was itself a particular nonconforming use and that its abandonment after 1988 caused its termination.

Because of these findings, the CBA opinion did not delve into a comparison of Hammond's proposed use with the original country store use or the Dold intensification. It is this very comparison, and the legal consequences, which the CBA must confront on the remand. In this connection, the CBA should review the factual record made in the 2003 hearing. It also may, in its discretion, allow further testimony if it believes that will be of assistance to its decision.

b. Discussion

BCZR 104.1 allows nonconforming uses to exist unless changed, abandoned or discontinued. BCZR 104.2 addresses fire or other casualty situations. As the CBA recognized in Hammond I, the policy of the law is to eliminate nonconforming uses over time. The Gardner case, *supra*, 293 Md. 259, at 267-68 states:

> "This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses. In *Grant v. Mayor and City Council of Baltimore,* 212 Md. 301, 307, 129 A.2d 363, 365 (1957), this Court said:
>
> "Nonconforming uses have been a problem since the inception of zoning. Originally they were not regarded as serious handicaps to its effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require

immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property owners at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun. Nevertheless, the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned, and the ordinances forbid or limit expansion of nonconforming uses and forfeit the right to them upon abandonment of the use or the destruction of the improvements housing the use."

Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *The Arundel Corp. v. Board of Zoning Appeals of Howard County,* 255 Md. 78, 83-4, 257 A.2d 142, 146 (1969); *Stieff v. Collins,* 237 Md. 601, 604, 207 A.2d 489, 491 (1965); *Colati v. Jirout,* 186 Md. 652, 655, 657, 47 A.2d 613, 614-15 (1946); *Beyer v. Mayor of Baltimore,* 182 Md. 444, 446, 34 A.2d 765, 766 (1943); *See Kastendike v. Baltimore Ass'n for Retarded Children, Inc.,* 267 Md. 389, 397, 297 A.2d 745, 749-50 (1972).
Whether a nonconforming use can be changed, extended, enlarged, altered, repaired, restored, or recommenced after abandonment ordinarily is governed by the provisions of the applicable local ordinances and regulations. *Feldstein v. La Vale Zoning Board,* 246 Md. 204, 211, 227 A.2d 731, 734 (1967); *Phillips v. Zoning Comm'r of Howard County,* 225 Md. 102, 109, 169 A.2d 410, 413 (1961); *Board of Zoning Appeals of Baltimore County v. Gue,* 217 Md. 16, 21-22, 141 A.2d 510, 513 (1958). These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses. *Mayor of Baltimore v. Byrd,* 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati,* 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore,* 180 Md. 88, 96, 23 A.2d 15, 18 (1941); *see City of Hagerstown v. Wood,* 257 Md. 558, 563, 263 A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County,* 220 Md. 48, 59, 151 A.2d 144, 150 (1959)."

The law does not favor a change in the nonconforming use by a kind of "creeping" process. Phillips v. Zoning Commissioner or Howard County 225 Md. 102 (1961). A property owner must prove both continuity and persistence of the same nonconforming use. A change or extension may come quickly or slowly. Calhoun v. County Board of Appeals of Baltimore County 262 Md. 265 (1971). In general, the law does not favor nonconforming uses and contemplates their gradual disappearance. Prince George's County v. E.L. Gardner, *supra.*

The Court of Appeals gave a helpful discussion of the boundary between intensification and extension in Jahnigen v. Staley 245 Md. 130 (1967). There was a nonconforming marina use. The new owners expanded the use by extension of the original pier and by construction of a new pier and other facilities. They also sought to increase the number of rowboats available for rental and the amount of rental space for dockage or wet storage of boats. The Court explained:

> "The basic premise underlying zoning regulations is to restrict rather than expand nonconforming uses. ... However, an intensification of a non-conforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used." Citations omitted.

Turning to the issue at hand, Judge Marbury wrote:

> "We agree that the construction of a new pier and other facilities, and the rental of space for the dockage or wet storage at any facilities other than the ninety foot wharf and T, which were in existence prior to the effective date of the zoning ordinance, were invalid extensions of the non-conforming use. However, we hold that the rental of rowboats cannot be so limited. Any increase in the number of rowboats rented would be an intensification of non-conforming use and would not be an extension."
>
> "The right of a landowner to continue the same kind of use to which the property was devoted on the critical date does not confer on him the right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use. ... Appellants argued that the launching of boats by means of a travel lift and ramp was an intensification of the launching that was done by the Kirchenbauers. The evidence showed that only a dozen or more boats launched in the years prior to the enactment of the ordinance. There was no permanent launching site nor structures to aid in the launchings. Boat launching was performed at no specific place during the years the Kirchenbauers owned the property, and it was so infrequent as not to have been part of their business. The testimony as to the launching of boats was too vague and inconclusive to establish that such use was regularly made before 1949, or that it was carried on thereafter. ... The launching ramp was constructed on the twenty-five foot strip which the Kirchenbauers purchased in 1962. The appellants cannot now set aside that particular portion of their property and construct a launching ramp." Citations omitted.
>
> "As to the storage of boats on the property, there was nothing in the record to show that the former owners allowed individuals other than themselves to store or repair boasts on their property, other than at the shoreline, prior to the adoption of the zoning ordinance. After the ordinance was passed a few boats belonging to other s were stored on the property, but again the number was insignificant. Also there was little repair work done on boats other than on the ones that were owned by the Kirchenbauers. Again the testimony as to the storage, repair and maintenance of boats other than those owned by

the Kirchenbauers was too vague and inconclusive to establish that such use was regularly made before 1949."

This illustrates the evaluation of the character of changes made to the original nonconforming use. The CBA here should compare the changes made or proposed by Hammond to the changes made in Jahnigen and the appellate court's assessments.

A subsequent CSA decision bears some resemblance to the present case. McKemy v. Baltimore County 39 Md. App. 257 (1977). It dealt with the impact of changes in nonconforming commercial parking associated with permitted business uses across the street, which also changed over time. The Court held, first of all, that the expansion of the nonconforming parking to adjacent lots was unlawful. 39 Md. App. at 265. Secondly, it held that the nonconforming use did not extend to dismantling of vehicles, storage of disabled vehicles, junk, or debris, or any operations accessory to a garage. Ibid. Thirdly, with respect to the CBA's approval of parking for fuel trucks on the original lots in conjunction with a fuel oil business as consistent with the original nonconforming parking in conjunction with restaurant use, the Court engaged in a more detailed analysis, which resulted in a remand. Judge Wilner wrote, 39 Md. App. at 269-70:

> "Upon those findings, it was incumbent upon the Board to determine, factually, whether those expanded uses represented a permissible intensification of the original use or an actual change from what the 1969 Board found existed in 1945 "to any other use whatsoever." In making that determination, the Board was not required to assume, and should not have assumed, that the lowest common denominator was "parking", or even "parking" in conjunction with a business across the street. In deciding whether that current activity is within the scope of the non-conforming use, the Board should have considered the following factors:
>
> **"(1) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;**
>
> **(2) Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature, and kind:**

(3) **Does the current use have a substantially different effect upon the neighborhood;**

(4) **Is the current use a "drastic enlargement or extension" of the original nonconforming use."**

Judge Wilner then added this observation, which should be borne in mind in the present case:

> The Board undoubtedly had some of these factors in mind, but its consideration of them was obviously flawed when it viewed the issue simply as "nonconforming parking in direct relationship to the business function" across the street. Because of its inappropriate reliance on that test, the Board failed to come clearly and completely to grips with these more relevant criteria. For that reason, and not because of any inherent unsoundness in the findings themselves, the conclusions of the Board as to whether the 1974 activities of Mr. McKemy with respect to Lot 442 and Lots 378-384, violate the county zoning regulations cannot stand. Instead, we shall remand that part of the case embodied in paragraphs numbers 1 and 2 of the 1974 order of the Zoning Commissioner to the Circuit Court with instructions that it, in turn, remand the case to the Board for reconsideration. The Board should consider not only whether, and to what extent, any such current uses exceed the permissible limits of the original non-conforming use, but, if it finds such excess, whether, by virtue of § 104.1 of the county zoning regulations , the entire non-conforming use has been lost."

The factors identified in McKemy are relevant to the task which the CSA opinion has assigned the CBA on the present remand. In this context, a change in the volume of lawnmowers sold and services would typically indicate an intensification. Moreover, the CSA opinion indicates that it is impractical to differentiate the service provided for lawnmowers sold at the site from those sold at other locations. On the other hand, any expansion in the area occupied by the nonconforming use would be indicative of an extension. In the same vein, an expansion of facilities would ordinarily suggest an extension. Therefore, any capital improvements which go beyond maintenance or restoration of facilities used in the past by Dold (and thus part of the previously approved country store) could reflect an extension of the original nonconforming country store use. It is also relevant to consider the extent to which any such improvements in the operation are likely to produce a more substantial impact on the neighborhood.

The performance of this task will require a careful evaluation of the facts in the record. The CBA may also decide, in its discretion, to allow the parties to present additional facts if this will be helpful to the decision. There must then be legal analysis of the facts in accordance with the relevant factors described in Judge Hollander's opinion and the case law.

VI. Estoppel in Depth: There Is No Basis for an Estoppel Argument

a. The October 27, 2003 Opinion (Hammond I)

While the CBA did not make any finding as to estoppel in Hammond I, it made this statement on page 4 of its opinion:

> "Finally, we are not unmindful of the position in which the Petitioner was placed by virtue of the letter to him of April 20, 2001 from the Baltimore County Department of Permits and Development. It was arguably not unreasonable for him to rely upon that communication to proceed with his project. It is only a matter of conjecture on the part of this Board as to whether or not the writer of that letter, Mr. Lloyd T. Moxley, read the entire Haines opinion or just the Order which accompanied it. This Board believes, however, that the letter in no way altered the facts or the applicable statutes and law in this case, and therefore was not significant in reaching this decision. Moreover, this Board has clearly and traditionally been limited in its jurisdiction to those subject areas specifically granted to it under statute. We are not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by Petitioner in this case for consideration."

Notwithstanding the CBA's reluctance to address the estoppel or related issues, the opinion was on target in its observation "... that the letter in no way altered the facts or the applicable statutes and law in this case ... " There is no "estoppel."

b. Discussion

Petitioner filed on February 10, 2003 a petition for special hearing for a determination of the scope and extent of his nonconforming use. BCZR 500.7 specifically authorizes such petitions to resolve issues concerning nonconforming uses and other legal issues. It functions, in effect, as a declaratory judgment process. Antwerpen v. Baltimore County 163 Md. App. 194,

209 (2005). It requires submission of a site plan, public notice, an opportunity to be heard, and a public hearing and written decision, with appeal rights.

Despite Petitioner's ultimate use of this process, he argues that the April 20, 2001 "spirit and intent" letter from Moxley purporting to authorize his resumption of the uses approved in Commissioner Haines' decision "estops" the county or anyone else from denying his proposed use. In other words, he claims that even if his proposed use is illegal, he is immune from challenge because he relied on Moxley's letter. This argument is without merit.

Moxley's letter, quoted by Judge Hollander at page 6 of her opinion, states in its entirety:

> "Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case. 89-204-SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale. Gasoline sales is not included on the list of approved non-conforming uses." (emphasis in original).

At the outset, it is apparent that, in the context of Hammond's stated desire to "reestablish" the earlier use, Mr. Moxley's description covered only the uses described and approved by the Zoning Commissioner in Case No. 89-204-SPH. It did not give Hammond *carte blanche* to modify, expand, and extend those uses under the guise or umbrella of lawnmower sales and service. For example, it did not cover any potential enlargement of the area used for lawnmower sales and service, new facilities, or addition or expansion of repair equipment and machinery with potentially extended impact on the neighborhood.

Even if Moxley thought he were giving such open-ended permission, or his letter could be so construed, it has been settled law for over 70 years that County departments have no authority to issue a approve or permit a use which conflicts with applicable zoning law. So, even if a building permit is issued, and a property owner has undertaken major construction as a result, such a use remains unlawful. This principle applies with even more force where a property

owner has submitted, *ex parte*, a general "spirit and intent" request instead of utilizing the special hearing process, which provides for specification of the use, public hearing, written findings, and appeal rights. The initial avoidance of the special hearing process here is particularly inexcusable here because the prior Zoning Commissioner decision reflected the intense interest of citizens in the area in the scope and extent of the nonconforming use.

The Court of Appeals has consistently rejected estoppel arguments under such circumstances in many cases. Cromwell v. Ward 102 Md. App. 691, 724-25 (1995) includes a recapitulation of the subject. Judge Cathell there wrote:

> "In the case of *Lipsitz v. Parr,* 164 Md. 222, 164 A. 743 (1933), a case seeking injunctive relief by way of a restraining order, a city officer mistakenly issued a building permit for an ice factory when the statute prohibited ice factories. The Court there held:
>
> > A municipality may be estopped by the act of its officers if done within the scope and in the course of their authority or employment, but estoppel does not arise should the act be in violation of law. . . . [T]he ordinance forbade the officials . . . to grant the permit which the plaintiff asked and obtained. . .
> >
> > . . . [I]t was therefore unlawful for the officers . . . to grant the permit, and it would be unlawful for the licensee to do what the purporting permit apparently sanctioned. A permit thus issued . . . does not . . . prevent the permit from being unlawful nor from being denounced by the municipality because of its illegality. . . . *Every one dealing* with the officers and agents of a municipality *is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled* by their acts when done without legal authority.
> >
> > So, even where a municipality has the power, but has done nothing, to ratify or sanction the unauthorized act . . . it is not estopped by the unauthorized or wrongful act of its officer . . . in issuing a permit that is forbidden by the explicit terms of an ordinance. . . . *Valentine v. Rds. Directors,* 146 Md. 199, 206 [126 A. 147] [(1924)]. . . . [Citations omitted, emphasis added.]
>
> 164 Md. at 227-28, 164 A. 743.

The Court cited *Lipsitz* in *Inlet Associates v. Assateague House Condominium Assoc.,* 313 Md. 413, 545 A.2d 1296 (1988), a case seeking specific performance and injunctive relief, and also cited *City of Hagerstown v. Long Meadow* Page 725 *Shopping Center,* 264 Md. 481, 287 A.2d 242 (1972), a case of a timely appeal of the denial of a building permit. In *Inlet Associates,* the Court opined that "[c]onsequently, `[e]veryone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal

authority.'" 313 Md. at 437, 545 A.2d 1296. The Court added: "[T]he doctrine of equitable estoppel `cannot be . . . invoked to defeat the . . . enforcement of . . . ordinances, because of an error or mistake committed by one of its officers . . . which has been relied on by the third party to his detriment.'" *Id.*"

Recently, in Marzullo v. Kahl 366 Md. 158, 194-99 (2002), the property owner made the estoppel argument, to wit, that it was "fundamentally unfair" to enforce the law because he had obtained a building permit and constructed his "reptile barn." In rejecting this argument, Judge Cathell quoted Lipsitz at length and added an insightful discussion of Town of Berwyn Heights v. Rogers 228 Md. 571 (1962):

"In *Town of Berwyn Heights v. Rogers*, 228 Md. 271, 179 A.2d 712 (1962), Phillip Rogers, a home builder, began construction of a residence in Berwyn Heights. Mr. Rogers had not started construction until he had received building permits from both the county's building inspectors and the Town of Berwyn Heights'[fn15] inspectors. The construction was in compliance with the permits; however, the Town of Berwyn Heights concluded that a mistake had been made in the issuance of the permits so that the residence was being built in violation of a zoning ordinance. The Town of Berwyn Heights filed suit to enjoin the construction of Mr. Rogers.

Mr. Rogers alleged that the Town of Berwyn Heights was estopped from filing suit because it and the county had issued Mr. Rogers building permits, and Mr. Rogers had expended substantial amounts of money in partially constructing the residence. The Court held that:

> "Some authorities hold that the principle of estoppel does not apply against a city, but the majority rule is to the effect that the doctrine of estoppel in pais is applied to municipal, as well as to private, corporations and individuals, at least where the acts of its officers are within the scope of their authority and justice and right requires that the public be estopped. And it has been held that municipalities may be estopped by reason of the issuance of permits. However, the cases and text-writers very generally state that a municipality is not estopped to set up the illegality of a permit. And the issuance of an illegal permit creates no `vested rights' in the permittee. *We have held above that the permits issued to the appellee were in violation of the zoning ordinance; consequently they were unlawful and* Page 199 *did not estop the appellant [the Town of Berwyn Heights] from prosecuting this suit."*

Id. at 279-80, 179 A.2d at 716 (citations omitted) (emphasis added).

While we are sympathetic to the plight in which respondent has found himself, we hold that the county is not estopped from enforcing the BCZR as it was applied by the Board of Appeals. We have held, generally, that permits that have been issued that are in violation of the zoning ordinances are unlawful and cannot be grounds for estopping a

municipality from the enforcement of the ordinance. We stated in *Lipsitz* that "the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." *Lipsitz,* 164 Md. at 227, 164 A. at 746."

In light of the case law, there is no foundation here to support an argument about "estoppel." The CBA should reiterate that these types of claims are not legitimate and are unacceptable. Where the facts and law do not support a petition, there is no excuse for an "estoppel" argument. This is particularly true where the property owner initially circumvented the available special hearing process, which would have provided due process of law for all parties. In resorting to and obtaining an informal "spirit and intent" letter of approval to "reestablish" an earlier use, he has attempted to gain leverage and seek immunity for impermissible expansion of a nonconforming use. This is unacceptable.

VII. Vested Rights in Depth: There is No Basis for a "Vested Rights" Argument

We repeat and condense the CBA's observation in its October 27, 2003 regarding Lloyd Moxley's April 20, 2001 reply to Hammond's request to "reestablish" the lawnmower sales and service use within the framework of the nonconforming country store:

"... the letter in no way altered the facts or the applicable statutes and law in this case."

Indeed, fairly read, all Moxley did was to restate what Commissioner Haines had approved in his 1988 opinion. Moxley did not represent that Hammond could expand the nonconforming use in such a way as to cross the line to an illegal extension. Indeed, Moxley did not have the authority to do that.

Commissioner Haines' decision confirmed the legitimacy of the nonconforming country store. Moreover, as understood by the CSA, the 1988 decision allowed the lawnmower sales and service operated by the Dolds as a permissible intensification. To the extent that nonconforming use law recognizes a form of vested rights, it vests only the use which exists prior to the

enactment of legislation to forbid the use, together with any "intensification." As explained in Gardner and many other cases, nonconforming use law does not vest the right to expand or extend the use. If Hammond had sought, and Moxley had approved, an expansion or extension of the nonconforming use, it would be invalid. The initial prerequisite to a claim of vested rights is that the use be a legal use. An extension of a nonconforming use is not a legal use.

In Marzullo v. Kahl *supra*, Judge Cathell rejected not only the property owner's assertion of estoppel, but also his claim of vested rights. 366 Md. at 191-94. There, the property owner ostensibly had much more to rely on than in the present case. He had obtained a building permit which purported to allow his use of the property for a facility to raise, breed, and keep reptiles or snakes. Here is what the Court had to say:

> Respondent contends that he has obtained a vested right to use his property to raise, breed, and keep reptiles or snakes. In his brief, respondent states that in order for him to have a vested right he must satisfy two prongs. The first prong is that there has to be a valid permit. The second prong is that substantial work has to be performed under the permit so that it would be discernable to a member of the general public that work under the permit was occurring. Respondent states that he has satisfied both of the prongs and has a vested right to use the property for his business. Respondent fails to properly apply the prongs and to understand the circumstances of when a vested right occurs.
>
> We examined the law of vested rights in Prince George's County v. Sunrise Development Limited Partnership, 330 Md. 297, 623 A.2d 1296 (1993). In *Sunrise*, we stated that:
>
> > "The third stream of cases involves the issue of vested rights, per se. By a per se vested rights case we mean one invoking 'that doctrine, which has a constitutional foundation [and which] rests upon the legal theory that when a property owner obtains a lawful building permit, [*55] 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 the earlier zoning, we borrowed from the law of nonconforming uses the concept of public [*56] knowledge in the neighborhood of the use, saying:

> 'In Maryland it is established that in order to obtain a "vested right" in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use. *See* Feldstein v. LaVale Zoning Board, 246 Md. 204, 210, 227 A.2d 731, 734 (1967), indicating that [*Mayor & City Council v.*] *Shapiro*[, 187 Md. 623, 51 A.2d 273 (1947)] as well as Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 A.2d 747 (1939), established as one of the tests for determining the existence of a nonconforming use "is whether such use was known in the neighborhood."' 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 [*57] 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)."330 Md. at 312-13, 623 A.2d at 1303-04 (alteration in original); *see* Sycamore Realty Co., Inc v. People's Counsel for Baltimore County, 344 Md. 57, 67, 684 A.2d 1331, 1336 (1996).

In the case *sub judice*, respondent obtained a permit and completed substantial construction; however, he is not entitled to have a vested right because there has been no change, applicable to his case, in the zoning law itself and the permit was improperly issued. When respondent obtained his permit and started construction, the BCZR was the same as when petitioners filed for a hearing before the Zoning Commissioner. The Zoning Commissioner and later the Board of Appeals were not making a subsequent change to the BCZR, they were just interpreting [*58] the BCZR as it was already enacted. Based on the decision of the Board of Appeals that we are affirming, respondent's permit was not a lawful permit because he could not lawfully conduct his business in an R.C.4 zone.

Respondent did not satisfy the first prong because his permit was not proper. Additionally, he was not being subjected to a subsequent change in the zoning regulations. Generally, in the absence of bad faith on the part of the remitting official, applicants for permits involving interpretation accept the afforded interpretation at their

risk. Therefore, respondent has not obtained a vested right to conduct his business on the property."

As in Marzullo, there is no vested right to an illegal use. If the CBA determines that the Hammond's use or proposed use amounts to or involves an illegal extension of the original nonconforming use, there is no vested right to such a use. Nor could Mr. Moxley authorize such an illegal use even if that were his intent. Indeed, it would undermine the law of nonconforming uses to allow such an illegal extension.

VIII. Summary

The determinative issue on remand is whether the Petitioner's use is a permissible intensification or an impermissible extension of the original nonconforming country store use. This will involve factual findings, inferences, and legal analysis consistent with the criteria and examples given in judicial decisions.

If the County Board of Appeals concludes that Petitioner's use is a permissible intensification, then the use is legal. If the CBA concludes, on the other hand, that it amounts to an impermissible extension, then it is illegal.

In this context, the law of "estoppel" is not applicable either factually or as a matter of law. The advice given by Lloyd Moxley was limited to the potential reestablishment of the original nonconforming use. In any event, the law does not allow a county official to authorize more than is allowed by law, and any permit or purported authorization for an illegal use would be invalid.

Likewise, the law of vested rights does not afford the Petitioner any right to the illegal extension of a nonconforming use. A petitioner has a right to a use which predates zoning law or has a valid permit and substantial construction prior to a change in the zoning law which otherwise would prohibit it. Here, the right is to a nonconforming use for a country store.

There has been no change in the law in this case. Neither Lloyd Moxley's letter nor the County's subsequent action or requirement of a special hearing involve any change in the law. The issue has been and remains the same. Does the law of nonconforming uses allow Petitioner's use or not, based on a comparison of his use with the original nonconforming use. Apart from the right to have a legal nonconforming use, there is no "vested right" to an illegal extension.

Peter Max Zimmerman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2006, a copy of the foregoing People's Counsel for Baltimore County's Remand Memorandum was mailed first class mailed, postage prepaid to Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030, and John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201 Attorney for Petitioner.

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Deputy People's Counsel

February 22, 2006

Kathleen Bianco, Administrator
County Board of Appeals
of Baltimore County
Old Courthouse, Room 49
400 Washington Avenue
Towson, MD 21204

RECEIVED
FEB 22 2006
BALTIMORE COUNTY
BOARD OF APPEALS

Re: Petition for Special Hearing
11942 & 11950 Falls Road
James M. Hammond – Petitioner

Dear Ms. Bianco:

Enclosed please find the People's Counsel for Baltimore County's Remand Memorandum for filing with regard to the above-mentioned case. Please be advised our office does intend to attend and participate in the hearing scheduled February 28, 2006.

Thank you for your consideration.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

PMZ\rmw
Enclosure

cc: Barbara Jung, Esquire, 11939 Falls Road, Cockeysville, MD 21030
John C. Murphy, Esquire, 516 N. Charles Street, Suite 206, Baltimore, MD 21201

1/26/06

COPY

IN THE MATTER OF:	*	**IN THE**
	*	**CIRCUIT COURT**
JAMES G. HAMMOND	*	**FOR**
	*	**BALTIMORE COUNTY**
	*	
	*	
	*	**Case No. 03-C-03-012458**
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ORDER

On November 15, 2005, the Court of Special Appeals of Maryland ordered Judgment of the Circuit Court for Baltimore County Vacated in the Matter of James G. Hammond, Case No. 03-C-03-012458. *Hammond v. Jung*, No. 00980 (Md. App. Sept. 15, 2005). The Court of Special Appeals of Maryland further ordered that this case be remanded to the Circuit Court for Baltimore County with instructions to remand to the Board of Appeals for further proceedings consistent with Judge Hollander's November 15, 2005 Unreported Opinion. *Id.* It is this 30th day of January, 2006,

THEREFORE ORDERED that the Matter of James G. Hammond, Case No. 03-C-03-012458, be **REMANDED** to the Board of Appeals of Baltimore County for further proceedings consistent with Judge Hollander's November 15, 2005 Unreported Opinion.

John O. Hennegan, Judge
Circuit Court for Baltimore County

cc:
John C. Murphy, Esq
John Cannan, Esq.
Barbara Jung
Board of Appeals of Baltimore County
Court of Special Appeals of Maryland

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BOARD OF APPEALS

ORDERS
OPINIONS
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UNREPORTED

IN THE COURT OF SPECIAL

APPEALS OF MARYLAND

No. 00980

SEPTEMBER TERM, 2004

JAMES G. HAMMOND

v.

BARBARA R. JUNG

Hollander,
Salmon,
Krauser

JJ.

Opinion by Hollander, J.

Filed: November 15, 2005

3C030012458

In this case, we must determine whether the Board of Appeals of Baltimore County (the "Board") improperly concluded that James Hammond, appellant, is not entitled to conduct a lawn mower sales and service business on his property in Baltimore County, because the proposed business constitutes an abandoned nonconforming use. In the proceedings below, Barbara Jung, appellee, participated as a protestant.[1] Unhappy with the Board's ruling, Hammond sought judicial review in the Circuit Court for Baltimore County, which affirmed.

On appeal, Hammond poses four questions, which we quote:

> I. Was the right to conduct the lawn mower sales and service lost as a result of a lapsed non conforming use?
>
> II. Is the lawn mower sales and service limited to service of lawn mowers actually purchased on the site?
>
> III. Does Hammond have the right to conduct the lawn mower sales and service as a result of vested rights or estoppel?
>
> IV. Does Hammond have the right to conduct the nonconforming use as a result of his contract with the county?

For the reasons that follow, we shall vacate and remand.

FACTUAL SUMMARY

The property in question, which includes the Ridge Country Store, is located at 11942 and 11950 Falls Road (the "Property"), in an RC-4 residential zoning district. Located on the west side

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[1] The Board is not a party to this appeal. Barbara Jung currently serves as a Judge of the District Court of Maryland. As she is proceeding in her personal capacity, we shall refer to her as "Jung."

of Falls Road, south of the intersection with Greenway Road in Cockeysville, the Property consists of 1.6575 acres. Appellant acquired the Property in early 2002.

On February 10, 2003, appellant submitted a "Petition for Special Hearing to the Zoning Commissioner of Baltimore County for the property located at 11942 & 11950 Falls Road which is presently zoned RC-4" (the "Petition"). In the Petition, appellant sought to clarify that "lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site...." In this regard, Hammond sought, "if necessary," to amend the prior orders in Case No. 89-204-SPH (the "Haines Decision") and Case 94-14-SPH.[2]

Deputy Zoning Commissioner Timothy M. Kotroco conducted an evidentiary hearing with regard to the Petition on March 20, 2003. Hammond appeared with counsel, and Jung testified in opposition to Hammond's request. She was supported by her neighbors, Kenneth Sadofsky and Kim Detrick.

Kotroco subsequently issued "Findings of Fact and Conclusions of Law," in which he denied appellant's request "to permit the repair of lawn and garden equipment on the subject property, with

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[2] We did not locate in the record any information as to Case 94-14-SPH. As best we can determine from a letter dated June 11, 2003, from Peter Max Zimmerman, Esq., People's Counsel for Baltimore County, to Board Chairman Lawrence M. Stahl, Esq., Case No. 94-14 "approved a barbershop, but this use never materialized...."

service not being limited to products sold on site." However, he ruled that "all other terms and approvals contained in [the Haines Decision] shall remain in full force and effect...."

In his Opinion, Kotroco noted that Hammond's neighbors were "concerned over the noise generated by such a facility and the amount of traffic coming and going on this site." He pointed out that the neighbors also "believe[d] such a use to be an unlawful extension of the non-conforming use that was granted by Commissioner Haines in 1988" in Case 89-204-SPH. Further, Kotroco wrote:

> The testimony offered by Mr. Hammond indicated that he proposes to convert the building identified on the site plan as Building "B" into a small engine repair facility. Mr. Hammond is desirous of repairing small engines such as those found on lawn mowers, riding tractors, chain saws and other similarly sized gasoline engines. He intends to service equipment belonging to the general public and not just the equipment that may be purchased on site.

In denying appellant's request, Kotroco said:

> After considering the testimony and evidence offered by the Petitioner, as well as the surrounding neighbors, I find that the special hearing request to allow a small engine repair facility to be permitted on the property should be denied. The decision rendered by Commissioner Haines in Case No. 89-204-SPH, dated November 30, 1988, is very clear. Commissioner Haines was careful to enunciate in his order those uses which were proven at the hearing before him to be truly non-conforming and therefore, permitted. While his order allowed lawn mower sales and service, he indicated on page 7 of his order that the "service of lawn mowers is only for products sold on site." The Petitioner's application in this case before me is an unlawful extension of the approvals granted by Commissioner Haines in Case No. 89-204-SPH and accordingly, should not be permitted to occur on the

subject property.

> In making this ruling, I am mindful of the testimony of the Petitioner's witnesses who stated that a prior owner, Mr. Dold, repaired lawn and garden equipment that was not purchased on the premises. From the testimony presented, this occurred on a regular basis. However, such testimony was not sufficient to cause Commissioner Haines to include this activity in his ruling. To the contrary, Commissioner Haines specifically limited the repair of lawn equipment. In the event Mr. Dold was not satisfied with Commissioner Haines' decision in 1988, he should have either filed an appeal or requested a modification at that time. In my opinion, it is not appropriate to expand this use by way of this special hearing request.
>
> THEREFORE, IT IS ORDERED, by the Deputy Zoning Commissioner for Baltimore County, this 11th day of April, 2003, that the Petitioner's Request for Special Hearing, to permit the repair of lawn and garden equipment on the subject property, with service not being limited to products sold on site, be and is hereby DENIED.
>
> IT IS FURTHER ORDERED, that all other terms and approvals contained in Commissioner Haines' decision in Case No. 89-204-SPH shall remain in full force and effect and shall not be affected by this decision.

From that decision, Hammond noted an appeal. The parties then convened for a *de novo* evidentiary hearing before the Board of Appeals on June 25, 2003.[3] Again, Jung appeared as a protestant, along with Detrick and Sadofsky. What follows is a summary of the evidence adduced at the hearing.

Hammond testified that his primary purpose in purchasing the Property "was to sell and service lawnmowers." He explained that

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[3] The Board members consisted of Chairman Lawrence Stahl, Charles Marks, and Margaret Worrall.

in April of 2001 he was interested in buying the Property, and sought to verify with Baltimore County that he could lawfully operate a "lawn and garden equipment sales and service" business on the Property. Appellant averred that, during his correspondence with the County regarding permissible uses on the Property, he "was in no way informed that there was any type of restriction whatsoever on the lawnmower sales and service operation."

At that time, the County advised Hammond to submit a "Letter of Spirit and Intent" to the Zoning Administrator, along with a check for $40, to ascertain permissible uses of the Property. Accordingly, by an undated letter, Hammond wrote to Arnold Jablon, Director of the County's Department of Permits and Development Management. In his letter, appellant said: "As directed by your office, I am submitting this [letter] in order to clarify and re-establish the non-conforming use certification" for the Property.

Hammond also stated:

> The rear 900 sf building was formerly approved for a lawn mower sales and service operation. Subsequently, the building had been used as a gift shop. I propose to re-establish the lawn mower sales and service operation and continue the additional uses below.

Therefore, he requested "a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses." Moreover, Hammond indicated that he reviewed the Haines Decision, and noted that it was his "understanding" that several uses were "permitted on the site in perpetuity," including

"Lawn mower sales and service"; "Plant and tree sales and Christmas tree sales"; "Gasoline sales"; "Deli/convenience store"; and a "Gift shop."

On April 20, 2001, Lloyd G. Moxley, a County zoning office employee, responded to Hammond's letter. In his response, Moxley relied on the Haines Deicision, a 1988 ruling by then Baltimore County Zoning Commissioner J. Robert Haines in Case 89-204 SPH, concerning the identical Property. Moxley advised that, based on the information furnished by appellant, as well as the County's "research of the zoning records," the County determined:

> Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, *the Commissioner approved the following non-conforming uses on said property, country store, food and grocery sales, deli operation, household hardware and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses.

(Emphasis in original).

Hammond offered into evidence the "Petition for Special Hearing," dated October 13, 1988, in Case 89-204 SPH (the "1988 Petition"), which culminated the Haines Decision. The 1988 Petition requested a "Special Hearing under Section 500.7 of the Baltimore County Zoning Regulations" to "determine whether or not the Zoning Commissioner ... should approve the continuance of non-conforming use of the property located at 11942 - 11950 Falls Road." The 1988 Petition, signed by Dennis Peddy as the "Contract

Purchaser" and Robert Dold as the "Legal Owner(s)," sought approval of a nonconforming use for the Store and a 1.5 acre lot, zoned R.C.5, permitting the sale of hardware, gasoline, plants, trees, Christmas trees, lawn mower sales and service, and garden supplies and equipment.

The 1988 Petition provided:

The history of the use of the Property is as follows:

11950 Falls Road (Building A)

1915-1950 - Han's Feed & Grocery Store - country store
1950-1955 - Enge's General Store - grocery, country store
1955-1972 - Sprecker's General Store - gasoline, country store, grocery, hardware, deli
1972-1982 - Dold's Lawnmower Sales & Service - country store, gasoline, etc.
1982-1988 - Ridge Country Store - gasoline, country store, grocery, antiques

11942 Falls Road (Building B)

1962-1982 - Scientific Plant Service - sales of replacement trees and plant supplies and materials
1982-1988 - Dold's Lawnmower Sales & Service - shrubs and tree sales (Christmas trees), plant supplies and materials

In addition, the 1988 Petition explained that Peddy intended to lease the Property at 11942 Falls Road and use it "to sell flowers, plants and related materials and supplies," as well as "Christmas trees for a two to three week period" in "December of each year." In the petitioners' view, such "use of the Property" would be "a continuance of the existing non-conforming use."

Further, the 1988 Petition stated:

> The uses of the Property are so encompassing that Mr. Peddy's intended use of the property at 11942 Falls Road is already covered under the existing permitted uses. However, since Mr. Peddy desires to spend monies to improve the existing building, he needs assurance of the continuance of the non-conforming use. Mr. Peddy is therefore requesting that the Zoning Commissioner certify the continuance of a non-conforming use of the Property.
>
> Mr. Robert Dold and Mr. Dennis Peddy respectfully request that the Zoning Commissioner find that the intended use of 11942 Falls Road by Mr. Peddy is in compliance with the Baltimore County zoning regulations since it is a continuation of a non-conforming use.

Hammond also entered the 1988 Haines Decision into evidence. As that decision is central here, we pause to review it.

According to the Haines Decision, Peddy "appeared and testified," and "was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses...," including "Barbara Jung." Indeed, there were no protestants.

Commissioner Haines recognized: "Zoning came officially to Baltimore County on January 2, 1945, when, pursuant to previous authorization by the General Assembly, the County Commissioners adopted a comprehensive set of zoning regulations." With regard to the petitioners' request for a nonconforming use, Commissioner Haines said:

> The proper review of a case for a nonconforming use is basically a factual review overlaid on to a legal background. If the facts fulfill all of the required standards, then the relief requested should be granted.
>
> The testimony and evidence tend to establish the following facts about the subject property. The site in

question has been zoned residential since the first zoning in 1945.

Commissioner Haines then reviewed the history of the commercial use of the Property noting that it dated from 1915, began as a "Feed and Grocery Store," and evolved into a "Country Store" or "General Store" "over the years." He found that although the site was zoned residential "since the first zoning in 1945," retail sales on the property continued and "have tended to include food and grocery products" and "[s]ome gasoline sales and small household products." According to Haines, "[t]he Farm, Feed Store and Outdoor Supplies which are now referred to as lawn and garden supplies have changed in type over the years, but the use appears continuous." Moreover, the Haines Decision determined that "[t]he plant sales and Christmas Tree sales are nothing more than a seasonal part of the Feed Store or Lawn and Garden operations." And, he stated: "The issue, of course, is not names, but uses or activities."

The Commissioner recognized that "[n]one of the residential zoning classifications has ever permitted the type of commercial activity that exist [sic] on the site." Nevertheless, he stated: "There is no evidence in the record that the business has ever lapsed for more than one year, nor is there any evidence that the basic operation has changed dramatically." Indeed, the Haines Decision observed that "the basic operation has remained unchanged for many years."

Regarding any change in use of the site over time, the Haines Decision found that the lawn mower sales and service was merely an "intensification" of the nonconforming use for a country store. Commissioner Haines wrote:

> Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. *The lawn mower sales and services is a change, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation.*
>
> There has been a refinement in the sense that plant sales and the Christmas tree sales are seen as accessory activities. These accessory activities are an outgrowth of the Lawn and Garden Supply operation. The hardware, deli and gasoline sales have been present on site since prior to January 7, 1945 or have not expanded in the nature of or scope of operations.
>
> There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation [sic] being undertaken. There is no automotive service garage and none will be permitted on this site. *The service of lawn mowers is only for products sold on site.*
>
> Building "C" is and will remain a storage building. No retail operations may be established therein. There will be no increase in the parking area and the nature growth areas will not be removed or reduced in size or area.
>
> After due consideration of the testimony and evidence presented, *it is clear the nonconforming use for the subject site should be granted.*

(Emphasis added).

In conclusion, Commissioner Haines ruled:

> THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 30th day of November 1988 that the *Petition for Special Hearing to approve a nonconforming*

> *use for a Country Store, with* Food and Grocery sales and Deli operation, Household Hardware, and *Lawn Mower Sales and Service* with Plant and Tree Sales, Christmas Tree Sales and Accessory Land and Garden Supplies and Equipment for sale, not including contractors or construction companies, landscaping or trucking operation or an automobile service garage, as indicated on Petitioner's Exhibit 1, which shall become the final development plan and final site plan, be and the same is hereby GRANTED.

(Emphasis added).

Following the Haines Decision, the Property was leased to Peddy, who terminated Dold's lawn mower business. As noted, in early 2002, after receipt of certain information from the County, appellant purchased the Property.

Hammond also presented several photographs of the Property, as well as a plat prepared on January 30, 2003. It shows that the Property is bordered on the east by Falls Road, which runs in a north-south direction. The north side of the Property is bordered by 12000 Falls Road, owned by Frederick E. Sieber. The western boundary adjoins the property of Margaret E. Mill at 11946 Falls Road and the property of Kenneth R. Sadofsky at 11944 Falls Road. On the south side, the Property faces land owned by Shirley L. Halloway, Robert E. Homer, and Nancy M. Dold (11926 Falls Road). The south side of the Property contains a large area marked as "BLACKTOP PAVING PARKING." The plat also depicts four buildings, numbered A - D.

"Building A," the largest structure, fronts Falls Road. The "GENERAL NOTES" on the plat indicate that "Building A,"

approximately 2,567.3 square feet in size, was previously used as a country store, grocery, and for gasoline sales. An area of "BLACKTOP PAVING" is located on the east side of "Building A," fronting Falls Road. A "1 ISLAND GAS PUMP" is located in front of "Building A," facing Falls Road.

"Building B" is situated behind "Building A," further west from Falls Road. The west side of "Building A" and the east side of "Building B" are separated by a stream and an area marked on the plat as "HEAVY GROWTH." "Building B" is surrounded on the east and north sides by an area marked "BLACKTOP PAVING." The plat indicates that "Building B" is also used for storage, and measures approximately 880 square feet.

"Building C" is located behind "Building A," further west from Falls Road. According to the plat, a stream runs between the west side of "Building A" and the east side of "Building C." The plat indicates that "Building C" measures approximately 216.3 square feet and is used for storage. "Building D" is southwest of "Building A," closer to Falls Road than "Building C" or "Building A." According to the plat, "Building D" is used for storage. On the east side of "Building D," facing Falls Road, is an area marked "HEAVY GROWTH," which extends to the southern boundary of the Property.

Appellant testified that he wants to conduct his lawn mower sales and service business in "Building B." Additionally,

appellant stated that he intends to use "Building C" as a "showroom" and to store new equipment.

Upon purchasing the Property in early 2002, Hammond commenced extensive renovations on the building that housed the former Store. The following colloquy is pertinent:

> [APPELLANT'S COUNSEL]: Mr. Hammond, am I correct that during the time you purchased the property, basically, until the present, most of your efforts were focused on the inside of these two buildings that you described?
>
> [HAMMOND]: Correct, trying to bring the mechanical systems and all those things up to a decent state of repairs, so they'd be usable.

He maintained that any machinery noise emitted from his Property was related to his renovation.

Hammond indicated that he planned to sell both "push and riding" lawn mowers, and wanted to sell "[c]hain saws and weed eaters and leaf blowers and tillers, and things of that nature," as part of a "full line of lawn and garden equipment." Appellant also said that he planned to repair "anything somebody wanted repaired as far as lawnmowers and lawn and garden equipment."

The Falls Road Community Association, Inc. ("the Association"), sent a letter to Hammond, dated December 13, 2002, signed by Harold H. Burns, Jr., President, indicating that the Association was concerned that he was engaging in nonconforming uses on his Property, not permitted under the Haines Decision. Hammond explained that, "shortly after" he received that letter, he again contacted Moxley with respect to permissible uses on his

[P]roperty. Moxley issued "a clarifying letter," advising that gasoline sales are permitted, but he did not discuss lawn mower sales.

Jung and Detrick also met with appellant to discuss potential restrictions on his use of the Property. Appellant introduced a copy of a document dated June 9, 2003, with the heading "DRAFT - FOR REVIEW PURPOSES," titled "RESTRICTIONS TO BE IMPOSED BY BALTIMORE COUNTY BOARD OF APPEALS, 11943 AND 11950 FALLS ROAD." The document provided a summary of appellant's intended lawn and garden equipment operations, hours of operation, and "modifications" of the Property, including the planting of evergreen trees and erection of fences to conceal much of appellant's Property from Falls Road and neighboring properties. Although Hammond acknowledged that the parties did not reach an agreement, he advised the Board that he remained willing to abide by the restrictions in the letter.

In addition, appellant presented an undated document titled "PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD." It contains several pages and bears approximately 175 signatures obtained in February and March 2003.

On cross-examination, Hammond acknowledged that he had a forklift on his Property to "[u]nload new equipment that comes crated." Moreover, he stated that he keeps a "front end loader" on the Property, which has a "tow hitch on the back," to "move things

about the property." And, he conceded that he planned to purchase a trailer to pick up and deliver lawn mowers. According to Hammond, he intended to keep his "equipment in the fenced yard behind the building."[4]

Appellant also stated that he has a one horsepower air compressor in the Store for customers to use to fill their vehicle tires. He acknowledged that the air compressor can be heard outside the building. However, he claimed that if the building doors are closed, the noise cannot be heard from Falls Road. He added that he is willing to close the doors when using the air compressor. Moreover, Hammond noted that, in the "back building," he maintains a seven and a half horsepower air compressor for his power tools, such as "[i]mpact wrenches and air ratchets."

Hammond agreed that he previously testified before Commissioner Kotroco that he planned to work on engines up to a hundred horsepower. He also conceded that Dold testified at the same hearing that he had only worked on engines up to twenty horsepower.

Dold testified in support of appellant's Petition. He recalled that he operated "Dold's Lawnmower Sales and Service" on the Property from 1972 to 1986. From 1972 until the date when appellant purchased the Property, Dold also operated the Store.

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[4] Presumably, Hammond was referring to "Building B," where he planned to engage in the lawn mower sale and repair business.

According to Dold, during his tenure he "sold and repaired lawnmowers, chain saws, weed eaters, blowers, different types of homeowners' equipment." Moreover, Dold stated that, for a period of time, he conducted his lawn mower business in the same building that appellant intended to use for the same purpose.

Notably, Dold testified that he serviced any lawn mower brought in for repairs; his business was not limited to lawn mowers that had been purchased at the site. Moreover, Dold recalled that, at the 1988 zoning hearing, there was no discussion regarding the limitation of lawn mower repairs to those lawn mowers sold at the site. Further, Dold stated that it was not his understanding, upon issuance of the Haines Decision, that he was restricted to servicing only lawn mowers that had been sold on the Property.

Martin Elwood Homer, who lived at 11926 Falls Road for twenty years, also testified in support of appellant. He worked at Dold's Lawnmower Sales and Service for approximately nine years before it closed. In that capacity, he "worked on mowers that came in, mowers [Dold] sold, new ones. Whatever we picked up, we worked on." Homer added that he also worked on "chain saws, tractors," and "wood splitters."

Other neighbors who testified in support of appellant's Petition included Margaret Mills, a resident at 11946 Falls Road; Elizabeth Hilb Sieber, who lived at 12000 Falls Road; William Hearn, a resident of Cockeysville; Stephen Todd, a resident in

White Hall; and Paul Stein, a resident of Reisterstown. Among other things, Todd suggested that the protestants presented a "misleading" description of the area. He noted that "Falls Road is an incredibly busy road, constant," and other businesses are in the area. He added: "This just is not an idyllic-like county setting.... It's a noisy place. To blame it on this operation ... is misleading."

Additionally, appellant submitted a written "Statement" from William Sprecher, dated June 24, 2003, who lives at 12401 Falls Road. It provided, in part:

> I had intended to attend the hearing on June 25 regarding Jim Hammond's appeal but I am due to have surgery on my foot that morning at GBMC.
>
> My father operated the store for about 17 years from the late 1950's up through the 1970s. During that time and for years after I was a customer of Dold's Lawn Mower Sales and Service.
>
> Dold's sold new lawn mowers and repaired lawn and garden equipment of many types. I recall they had a dealership for Arens riding mowers. *They repaired any piece of lawn and garden equipment anyone brought to them, and there was never any restriction to equipment purchased at the property.* They had trailers deliver mowers to them and they used trailers to pick up equipment.

(Emphasis added).

Appellee has lived at 11939 Falls Road, across the street from Hammond's property, since 1984. She conceded that she "supported Bob Dold in 1988," explaining that "he was a known quantity" and she "didn't hear him." Moreover, she acknowledged that Dold

serviced her lawn mower, although she did not buy it from him. However, she claimed that the area was then "quiet" and complained, "that's not how it is now."

Jung acknowledged that Hammond "has worked like a dog" to enhance the appearance of the Property, and she conceded that he "addressed a lot of [her] concerns." She also noted that he has done "a tremendous amount" of cleaning up at the Property. Nevertheless, she maintained that she is disturbed by loud noises generated by the use of the air compressor and power tools. Noting that "[t]he noise is truly the issue," she explained: "... I can't agree to hear that noise from eight to five on Saturdays, and some day soon I won't be going to work during the week." Further, she stated: "I don't know how he can agree to regulate the noise when he's trying to run a business, and I couldn't agree to him making the noise that I hear from coming there, that I didn't hear from Bob's [i.e., Dold]...."

Appellee submitted a copy of a document signed by John A. Galbreath, President of the Association, dated June 12, 2003, expressing the Association's opposition to appellant's Petition. She also submitted a document dated May 19, 2003, signed by Galbreath on behalf of the Association, which stated: "Responsibility for review and action on all zoning and development matters shall be placed in the board of directors."

On cross-examination, Jung acknowledged that she attended the

1988 hearing. When asked if she recalled any discussion at the 1988 zoning hearing regarding a limitation on the repair of lawn mowers to those that had been sold there, she responded: "My recollection is we went in and we were all sitting on one side, and it was, this is a petition to do this. Is there any opposition? To which we said, No.... I don't remember anybody specifically saying mowers limited to what he sold." Indeed, Jung conceded that Dold repaired lawn mowers that were not purchased on site. And, appellee asked Hammond to repair her mower when he first moved in, although he did not do so. Yet, she maintained that the Haines Decision limited repairs of lawn mowers to those sold on the Property.

Detrick, who resides at 11941 Falls Road since 1992, lives next to Jung and "across the street" from appellant. She insisted that no prior business on Hammond's Property "produced a fifth of the noise" that has occurred since appellant's purchase. However, Detrick stated: "If Mr. Hammond ... can come up with a way to limit the noise drastically, I think I would be receptive to that."

Sadofsky, a member of the Association's Board of Directors, has lived at 11944 Falls Road since November 1997. He, too, has been disturbed by the noises emanating from appellant's Property. On cross-examination, Sadofsky clarified that he was particularly concerned about the future increase in noise once Hammond begins his lawn mower repair business. Nevertheless, Sadofsky testified

that he does not have a problem with Hammond occasionally doing mechanical work. Rather, he objects to Hammond "running a full scale operation."

Pursuant to the Board's request, appellant submitted a "Hearing Memorandum" on July 28, 2003. In his memorandum, appellant posed three questions for the Board's consideration:

> 1. What is the effect [in the text of the Haines Decision] of the sentence - "The service of lawn mowers is only for products sold on site"?
>
> 2. Did the non-conforming use lapse?
>
> 3. Is the County estopped to limit service to mowers purchased on site when it did not state any such restriction in written response to Hammond's request?

Regarding the effect of the phrase "service of lawn mowers is only for products sold on site," appellant averred that, if Commissioner Haines was describing the "existing operation" on the Property, then "one has to assume that Commissioner Haines somehow misunderstood the testimony that he heard." Appellant referred to the testimony of Dold and Jung, informing Commissioner Haines that lawn mowers purchased off-site were repaired on the Property. Appellant also asserted that, "if Commissioner Haines found as a fact something which had no basis in the record, his decision would be arbitrary and capricious."

According to appellant, Haines merely meant to indicate that lawn mowers were sold at the Store, not that all lawn mowers that were serviced at the Store had been purchased there. Further,

noting that "interpretations should be consistent with common sense," appellant questioned how such a restriction could even be enforced. And, focusing on the word "is," he insisted that the phrase merely described the existing operation. Moreover, he argued that if the Haines Decision intended to restrict the repair of lawn mowers to those sold on the Property, then such a requirement would have been included in the Order. In this regard, appellant observed that "the operative terms of a court decision are found in the order, not the opinion."

Further, appellant recognized that "[t]he rule established in the zoning code is that non-conforming uses lapse if abandoned or discontinued for a period of one year or more." Appellant conceded that "[t]he use for lawn mower sales and service was discontinued when Dold's Lawn Mower Sales and Service ceased to operate sometime after 1989." However, he maintained that "the lawnmower sales and service was never a non-conforming use." Rather, he argued that it was the Store that was the nonconforming use; that use was never abandoned; and the lawn mower business was a mere intensification of the original nonconforming use. Therefore, although the lawn mower repair business had been abandoned, appellant claimed it could reemerge because it is merely an intensification of the original nonconforming use.

Elaborating, appellant explained that, because the lawn mower sales business was not established until 1972, it could not qualify

as a nonconforming use. Instead, argued appellant, "Commissioner Haines allowed the lawn mower sales and service as a permissible intensification of the original non-conforming use." He explained that, when "the use has changed, then the original non-conforming use is lost; if it is a mere intensification - where the current activity is within the scope of the non-conforming use - then the original non-conforming use remains." Appellant stated: "As long as the non-conforming use remains, the country store, the right to have a permissible intensification remains."

In addition, appellant argued that the County was "estopped to change its position after Hammond relied on its written advice and purchased and improved the [P]roperty in reliance on the County's written determination." Appellant also asserted that he contracted with the County "for a determination," which required a $40 fee, and that the County was "now estopped to deny the contract."

On the same date, appellee also filed her memorandum. She stated: "The issue is whether the lawn mower repair part of the business has been abandoned and that therefore the owner, James Hammond, should be stopped from continuing the lawn mower repairs business." She claimed that the "nonconforming use as a Lawn Mower Repair Shop has been abandoned....", because "[t]he undisputed evidence" showed "that the last time mowers were repaired on the property was 1988," fifteen years before appellant initiated the pending proceedings. Appellee added that, since 1988, "[n]eighbors

have moved in ... not knowing that they were living next door to a property that could be used for the repair of lawn mowers."

Moreover, appellee disputed appellant's contention "that there has been no abandonment [merely] because the Ridge Store has continually operated...." She asserted:

> Clearly, one property can have multiple nonconforming uses, in this case the country store, run in the front building of the property and the lawn mower sales and repair, run from the three buildings in the rear of the property. One nonconforming use has not been abandoned, but the other has.

Furthermore, Jung argued that "[t]he general rule for the expansion of nonconforming uses is that it is lawful for the use to be intensified, but unlawful for the use to be extended." In her view, appellant's decision to operate a lawn mower business on his Property was an unlawful "change in use."

In addition, appellee maintained that appellant should not have "accept[ed] Mr. Moxley's letter as the final say on the issue," when he "could have requested a hearing by the Zoning Commissioner prior to purchasing the property...." She urged that, even if the Board assumed that appellant "had a right to rely on Mr. Moxley's letter, the County is not estopped from subsequently citing him for violating the Order in Case number 89-204 SPH." In her view, the doctrine of equitable estoppel does not apply to a municipality enforcing its ordinances. Moreover, Jung noted that "there is not one shred of evidence as to the amount of money that Mr. Hammond has spent in reliance on [Mr. Moxley's] letter and such

evidence is absolutely required."

Appellee also contended that "Baltimore County could not be sued for negligence based on governmental or sovereign immunity," because "the county cannot be sued if the negligence occurred during the performance of a governmental function, as opposed to a proprietary function." According to appellee, Mr. Moxley's letter was an exercise of a governmental function because "the enforcement of zoning laws is governmental in nature." Appellee added that Moxley could not be sued individually because, as Jablon's agent, he was acting as a public official in his official capacity.

The Board issued a written "Opinion" on October 17, 2003, denying Hammond's Petition. It found that the Property was "utilized as a 'country store' predating zoning in Baltimore County." Moreover, the Board recognized that, from 1972 to 1988, Dold "operated a country store on the property, including a lawnmower repair shop." The Board said:

> In 1988, in furtherance of a potential lease to Dennis Peddy, the Dolds requested a special hearing to confirm the continuation of the nonconforming use of the property as a country store and as a lawnmower sales and repair location. In his opinion dated November 30, 1988, then-Zoning Commissioner Robert Haines confirmed the nonconforming use of the country store. In his Opinion (as opposed to the Order which accompanied the Opinion), he limited repair services only to those machines actually sold on the site. No appeal was taken from his decision. *As a result, the Dolds apparently discontinued their lawnmower repair services on the site*; and although the property was, in fact, leased to Mr. Peddy who continued to operate the country store, no lawnmower sales or service occurred at the location from 1989 to the present day.

(Emphasis added).

The Board explained that "zoning authorities of each county maintain the right to limit the ability to change, expand, or alter nonconforming use." Noting that the purpose of restricting nonconforming uses "is to achieve the ultimate elimination of nonconforming use," the Board observed that "statutes regarding such uses must be strictly construed to accomplish that purpose." According to the Board, "when people move into a neighborhood, they should be able to reasonably identify the existence of a nonconforming use in their area in order that they might make an appropriate decision as to whether or not they desire to purchase in the vicinity of such nonconforming use."

Further, the Board stated:

> The uncontroverted testimony is clearly that the country store existed prior to the imposition of zoning regulations in Baltimore County. The question of such a use in existence was reconfirmed in Commissioner Haines' decision. Although Petitioner questions whether the restrictions on lawnmower repairs contained in Commissioner Haines' decision appearing in the body rather than in the Order at the conclusion of his Opinion are valid, the historical timeframe of the fact of lawnmower sales and service on the subject property is unquestioned. No lawnmower repairs had occurred on the subject site since 1988.
>
> This Board looks with approval upon the conclusions of the Supreme Court of Vermont in the case of *Appeal of Gary and Suzanne Gregoire*, 170 Vt. 556, 742 A.2d 1232 (1999) in which that Court held that a particular property could be assigned more than one nonconforming use, some of which might be abandoned while others continued unabated. Although there appears to be no Maryland case law on the point, we read this decision in conjunction with *Landy [v. Bd. of Zoning Appeals, et al.*,

> 173 Md. 460 (1937)] and reject Petitioner's contention that, even though no lawnmower repairs were done on the subject site for the past 15 years, the continued nonconforming existence of the country store carries with it the right to essentially reinstate the nonconforming use of sales and repair of lawnmowers at this time.

Accordingly, the Board unanimously determined that "the owners of the subject site did indeed allow the nonconforming use of lawnmower sales and service to be abandoned for a period exceeding one year; and that, pursuant to *Baltimore County Zoning Regulations* § 104.1, the permission to carry on those activities at the subject site no longer exists." But, it ruled that "those nonconforming activities not so abandoned may in fact continue."

The Board declined to address appellant's claim that, based on Moxley's letter, the County was estopped from restricting his use of the property. It reasoned:

> Finally, we are not unmindful of the position in which the Petitioner was placed by virtue of the letter to him of April 20, 2001 from the Baltimore County Department of Permits and Development Management. It was arguably not unreasonable for him to rely upon that communication to proceed with his project. It is only a matter of conjecture on the part of this Board as to whether or not the writer of that letter, Mr. Lloyd T. Moxley, read the entire Haines opinion or just the Order which accompanied it. This Board believes, however, that the letter in no way altered the facts or the applicable statutes and law in this case, and therefore was not significant in reaching this decision. Moreover, this Board has clearly and traditionally been limited in its jurisdiction to those subject areas specifically granted to it under statute. We are not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by Petitioner in this case for consideration.

Appellant subsequently filed a "Petition for Judicial Review"

in the Circuit Court for Baltimore County. After the parties filed various memoranda, they convened for a hearing on April 22, 2004.[5]

On July 8, 2004, the circuit court issued an "Opinion and Order" affirming the Board's decision. The court determined that "there was substantial evidence for the Board of Appeals's finding that the lawn mower operation was an abandoned nonconforming use [under section 104.1 of the County Zoning Regulations] and not an intensification." In this regard, it noted that the lawn mower operation had "ceased for over a year."

Moreover, the court determined that the lawn mower sales and service was a separate nonconforming use and, because the business ceased in 1989, the use had lapsed. The court stated:

> Subsequent to the termination of the lawn mower operation in 1988, the store reached a juncture upon which the character of its operations significantly changed. The store's uses were limited to selling food and antiques/gifts. Thus, by allowing the lawn mower operation to start up again, this Court would permit the change of the nature and character of the most recent uses of the property. Therefore, this Court finds that the lawn mower is not an intensification of the existing nonconforming use, but an impermissible change in the use of the property.

In addition, the court rejected Hammond's estoppel argument. In its view, appellant "relie[d] upon the Baltimore County letter to his own detriment," and "accepted the approval at his own risk." Quoting *Marzullo v. Kahl*, 366 Md. 158, 199 (2001), the court stated: "'[V]iolation of zoning ordinances are unlawful and cannot

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[5] We have not been provided with a transcript of the hearing.

be grounds for estopping a municipality from enforcement of the ordinance.'" Moreover, the court decided that appellant did not have a "vested right" in the lawnmower sales and service operation because he did not "perfor[m] substantial construction on a permitted use."

We shall include additional facts in our discussion.

DISCUSSION

I.

The Board is an administrative agency, and its decision is subject to "a full judicial review." *Alviani v. Dixon*, 365 Md. 95, 107 (2001) (discussing special exceptions). Therefore, we review the final decision of the administrative agency in accordance with the well established principles of administrative law. *See, e.g., Maryland Aviation Administration v. Noland*, 386 Md. 556 (2005); *Bd. of Physician Quality Assurance v. Mullan*, 381 Md. 157, 165 (2004); *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 527-29 (2004); *Gabaldoni v. Bd. of Physician Quality Assurance*, 141 Md. App. 259, 261 (2001); *Carriage Hill Cabin John, Inc. v. Md. Health Res. Planning Comm'n*, 125 Md. App. 183, 220 (1999). Accordingly, in this case, we review the Board's decision, not the decision of Commissioner Kotroco.

When we review the decision of an administrative agency, our role is the same as that of the circuit court. *Capital Commercial Props., Inc. v. Montgomery County Planning Bd.*, 158 Md. App. 88, 95

(2004). "'It is a clearly established rule in the law of zoning that a court may not substitute its judgment for that of the Zoning Board.'" *Stansbury v. Jones*, 372 Md. 172, 182 (2002)(citation omitted); *see Bd. of Physician Quality Assurance v. Banks*, 354 Md. 59, 68 (1999). With respect to zoning matters, we have recognized that "the zoning agency is considered to be the expert in the assessment of the evidence, not the court." *Bowman Group v. Moser*, 112 Md. App. 694, 699 (1996), *cert. denied*, 344 Md. 568 (1997). *See also Cremins v. County Commr's of Washington County*, ____ Md. App. ____, No. 2200, September Term, 2003, slip op. at 10 (filed September 29, 2005); *White v. Spring*, 109 Md. App. 692, 699, *cert. denied*, 343 Md. 680 (1996). And, we give "considerable weight" to an agency's "interpretations and applications of statutory or regulatory provisions" that are administered by the agency. *Noland*, 386 Md. at 573 n.3.

As to an agency's final decision, we consider "'(1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision.'" *State Highway Admin. v. David A. Bramble, Inc.*, 351 Md. 226, 238 (1998) (citation omitted); *see Total Audio-Visual Systems, Inc. v. Dep't of Labor*, 360 Md. 387, 394 (2000); *Mayberry v. Bd. of Educ. Anne Arundel County*, 131 Md. App. 686, 701 (2000).

In *White v. North*, 356 Md. 31 (1999), the Court of Appeals elucidated the process of review applicable to zoning matters:

> In judicial review of zoning matters, including special exceptions and variances, "the correct test to be applied is whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions." For its conclusion to be fairly debatable, the administrative agency overseeing the variance decision must have "substantial evidence" on the record supporting its decision.

Id. at 44 (internal citations omitted); *see also Alviani*, 365 Md. at 107-108; *Mastandrea v. North*, 361 Md. 107, 133-34 (2000).

An agency's factual findings are binding upon a reviewing court, so long as they are supported by substantial evidence in the record. *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 577 (1994); *Mortimer v. Howard Research*, 83 Md. App. 432, 441, *cert. denied*, 321 Md. 164 (1990). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512 (1978); *see Gigeous v. ECI*, 363 Md. 481, 497 (2001). In other words, the reviewing court must ask whether "reasoning minds could reach the same conclusion from the facts relied upon by the Board." *Dep't. of Labor v. Hider*, 349 Md. 71, 78 (1998). Conversely, when a zoning board's decision is based upon an error of law, it is "owed no deference...." *Belvoir Farms Homeowners Assoc., Inc. v. North*, 355 Md. 259, 267 (1999); *see Stansbury*, 372 Md. at 184.

Of import here, an appellate court will review an adjudicatory

agency decision "'solely on the grounds relied upon by the agency.'" *Schwartz v. Md. Dep't of Natural Resources*, 385 Md. 534, 555-56 (2005) (quoting *Brodie v. MVA*, 367 Md. 1, 4 (2001)). In effect, this means that the agency must be right for the right reason.

II.

According to appellant, "The error that the board and the lower court made was to decide all over again the status of the lawn mower sales and service as a permissible use of the property which had already been decided in the Haines decision." Appellant maintains that the 1988 Haines Decision was "plainly correct," and "approved one non-conforming use - the Country Store - with the other uses being associated with that use." In his view, the Haines Decision established that the lawn mower sales and service operation was merely an intensification of the pre-existing nonconforming use (i.e., the Store), and not a separate nonconforming use.

Asserting that the Store was the nonconforming use, and characterizing the lawn mower business as an intensification of that use, appellant insists that "Maryland case law is firm that every non-conforming use has a right to a reasonable intensification of that use within the scope of the original non-conforming use." He suggests that "a practical test for determining whether a new use is a reasonable intensification of an

existing non-conforming use ... is whether the similarities between the uses are greater than the differences." According to appellant, because the Haines Decision found that the Store customarily sold hardware, the sale and service of lawn mowers is "something one would expect at every hardware store[.]"

Hammond continues: "The fundamental difference between the continuation of the non-conforming use and the continuation of an intensification of a non-conforming use is that [Baltimore County Code of Zoning Regulations 104.1] addresses the former and says it ceases if discontinued or changed." Because the underlying nonconforming use has never ceased, appellant insists that the right to intensify remains intact. The effect of the Board's ruling, asserts Hammond, is that "the cessation of the intensification of the non-conforming use results in the loss of that use even though as here the non-conforming use remains, [so that] the non-conforming use has lost its ability to intensify even though the use continues unabated."

In Hammond's view, the "consequences of the rule followed by the Board would be absurd." To illustrate, he states:

> For example, it might be permissible intensification of the general store to repair screens. As long as that use is not undertaken, the right to do it continues. But once its [sic] started, it would be lost forever if it ever ceased. This is an absurd result.

Noting that the Haines Decision involved "essentially the same parties and the same issue," appellant also insists that the Haines

Decision is "controlling" and "binding on the parties and their privies." In this regard, he argues that the Haines Decision determined that the store was a lawful nonconforming use and that the lawn mower sales operation was a lawful intensification. He states:

> The rule is not strictly one of res adjudicata since a formal court is not involved, cf. *Woodlawn Area Citizens Ass'n v. Board*, 241 Md. 187 (1966), but the courts describe the practical effect as the same, see *White v. Prince George's County*, 282 Md. 641, 658 (1978) ("principles of public policy underlying the rule of res judicata [are] applicable to ... administrative agencies performing quasi judicial functions").

Hammond also contends that the Board's decision reflects its misconstruction of the Haines Decision, and its misapprehension of the concept of a nonconforming use. He urges that the lawn mower sales and service operation could not have been a nonconforming use, much less one that lapsed, because the business did not "come into existence until 1972." By definition, argues appellant, the lawn mower business "could not have been a non-conforming use since it did not precede the adoption of the zoning in 1945." In other words, argues Hammond, the lawn mower sales and service could have been approved only as an intensification. He reasons: "If it was a new non-conforming use, it couldn't be approved since it started in 1972."

In his Reply brief, appellant reiterates that "the lawn mower sales and service was not a non-conforming use," because "it was not a lawful pre-existing use which predated the zoning

regulations." Accordingly, he contends that "the decision of the [Board and the] lower court was premised on a fundamental error and has to be reversed." Thus, he asks us to remand the matter to the Board "to determine whether the lawn mower sales and service is a permissible intensification of the non-conforming use."

Jung complains because appellant "wants to re-establish a use that has been non-existent since 1988." Appellee concedes that the Haines Decision "found that the lawn mower sales and service was an intensification of the non-conforming use of the Country Store." Jung also acknowledges that the facts showed that "lawn mower repairs had been on-going on the site since 1972." But, she points to the fact that the lawn mower business "ceased" in "the late 1980's," and "no mower or small engine repairs have been done on the property since that time and that the use has actually changed to a retail shop."

According to Jung, "The question to be determined by ... this Court is not whether Commissioner Haines was correct in 1989 [sic], but whether the subsequent change in use from lawn mower repairs to the less intrusive antique shop changes the use to such an extent [that] BCZR 104.1 takes effect." She insists that, "even if lawn mower repairs was [sic] a lawful non-conforming use in 1989 when Commissioner Haines made his decision, that non-conforming use has changed to such an extent that it has lapsed pursuant to Baltimore County Zoning Regulation 104.1."

According to appellee, appellant's plans are "proof that his shop would have a substantially different effect on the neighborhood and that it is a drastic enlargement of the original use." In particular, appellee points to Hammond's testimony that he "has a forklift on the property to unload equipment, that he has a front end loader on the property to move equipment and to bulldoze the parking lot, that he plans to work on engines up to 100 horsepower...."

Further, Jung avers that there is "abundant evidence to support" the Board's finding that "'the owners of the subject property did indeed allow the non-conforming use of the lawn mower repair and service to be abandoned for one year.'" Noting that "non-conforming uses are not favored in Maryland," appellee argues "that the Zoning Authorities of each county have the right to limit the ability of the property owner to change, expand, alter or recommence the non-conforming use after it [sic] cessation." Moreover, appellee asserts that because "the ultimate aim of such Zoning Regulations [is] to eventually eliminate non-conforming uses," the Zoning Regulations "should be strictly construed in order to eliminate non-conforming uses."

Before addressing the parties' contentions, we pause briefly to discuss zoning and nonconforming uses.

Zoning is the creation of distinct divisions of land within a jurisdiction according to the suitability of the land for various

uses. *See generally Schultz v. Pritts*, 291 Md. 1 (1981); *Northwest Merchants Terminal v. O'Rourke*, 191 Md. 171 (1948); *Applestein v. Baltimore City*, 156 Md. 40 (1928); *Baltimore County v. Wesley Chapel*, 110 Md. App. 585, 602, *rev'd on other grounds*, 344 Md. 52 (1996). "The very essence of zoning is territorial division according to the character of the land and the buildings, their peculiar suitability for particular uses, and uniformity of use within the zone." *Heath v. Mayor of Baltimore*, 187 Md. 296, 305 (1946).

Zoning and planning are separate functions, however. *Howard Co. v. Dorsey*, 292 Md. 351, 361 (1982); *Board of County Comm'rs of Carroll County v. Stephans*, 286 Md. 384, 389 (1979); *Wesley Chapel*, 110 Md. App. at 604. At least one function of zoning is "to preserve various types of neighborhoods, be they residential, industrial, commercial, or historical." *Montgomery County v. Horman*, 46 Md. App. 491, 497-98 (1980). Planning, on the other hand, is a broader concept, encompassing the development of a community and the creation of "goals for orderly growth and development including the establishment of viable neighborhoods for which it delineates appropriate boundaries," and "suggest[ing] methods for implementation and achievement of those goals, including proposals for future land use and zoning classifications." *Dorsey*, 292 Md. at 362. *See Washington County Taxpayers Assoc., Inc. v. Board of County Comm'rs*, 269 Md. 454,

455-56 (1973) ("planning embraces zoning, in a general way, but the converse is not true"); *Wesley Chapel*, 110 Md App. at 604; *see also* 1 E. Yokley, *Zoning Law and Practice* §§ 1-2 (4th ed. 1978) (noting that "zoning is almost exclusively concerned with use regulation, whereas planning is a broader term and indicates the development of a community...."); 101A C.J.S. *Zoning and Planning* § 5 (1979) ("`Planning' contemplates the evolvement of an overall program or design of the present and future physical development of the total area and services of an existing or contemplated municipality, while `zoning' is part of an end result or product of planning").

The power to zone is a legislative function. *Anne Arundel County v. McDonough*, 277 Md. 271 (1976); *Nottingham Village, Inc. v. Baltimore County*, 266 Md. 339 (1972); *Board of County Comm'rs for Prince George's County v. Edmonds*, 240 Md. 680 (1965). The authority stems from the State's police power to regulate in the interest of the general welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Village of Maryland-National Capital Park & Planning Comm'n v. Mayor of Rockville*, 272 Md. 550, 560 (1974); *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 65 (1969); *American Oil Co. v. Miller*, 204 Md. 32 (1954).

In *Lone v. Montgomery County*, 85 Md. App. 477 (1990), this Court explained that a nonconforming use is one that precedes the implementation of the zoning ordinance. We said, *id.* at 496:

An owner of land may establish a "lawful nonconforming

> use" if the evidence conclusively establishes that before and at the time of adoption of the original zoning ordinance, he was using substantially all of his tract of land in a then-lawful manner for a use which by the later legislative action became nonpermitted. *Bd. of Zoning Appeals of Howard County v. Meyer*, 207 Md. 389 (1955).

To be sure, there is a "strong legislative and judicial disinclination in Maryland and elsewhere to permit the expansion of non-conforming uses." *Trip Associates, Inc. v. Mayor and City Council of Baltimore*, 151 Md. App. 167, 177, *cert. granted*, 377 Md. 112 (2003). Nonconforming uses are discouraged by law as inherently incompatible with permitted uses in the zoning district and contrary to the plan for development. *County Council of Prince George's County v. Gardner, Inc.*, 293 Md. 259, 267 (1982).

In *Gardner*, *id.* at 267, the Court explained: "Such nonconforming uses pose a formidable threat to the success of zoning. They limit the effectiveness of land use controls, contribute to urban blight, imperil the success of the community plan, and injure property values." Similarly, in *Mayor & City Council of Baltimore v. Dembo*, 123 Md. App. 527, 538 (1998), the Court recognized that "the fundamental problem facing zoning is the inability to eliminate the nonconforming use." *See Grant v. Mayor of Baltimore*, 212 Md. 301, 308 (1957). Thus, a primary goal of zoning law has been "to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned." *Id.* at 307.

Consequently, when considering such a use, "local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming use." *Gardner*, 293 Md. at 268. And, in an application for nonconforming use, the burden of proof rests squarely on the applicant. *Carroll County Comm'rs v. Uhler*, 78 Md. App. 140, 145, *cert. denied*, 316 Md. 428 (1989). "Whether the party has met its burden is a matter entrusted to the Board. Since that decision, as is the decision whether to certify a nonconforming use, can be made only after hearing and determining facts, the Board acts in a quasi-judicial capacity in making it." *Id.*

Yet, because zoning ordinances are "prospective," they cannot be used to terminate a valid nonconforming use. *Amereihn v. Kotras*, 194 Md. 591, 601 (1950). In other words, a zoning regulation cannot be applied to "destroy[] a vested right" of the owner to continue to use his property as it was used before the zoning regulation was implemented. *Id.* In *Amereihn*, the Court explained: "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.* *See also Dembo*, 123 Md. App. at 527 (recognizing that a valid nonconforming use is a "property right that has been long recognized under Maryland law as a vested right subject to constitutional protection").

This Court identified four "factors" in *McKemy v. Baltimore County*, 39 Md. App. 257, 269 (1978), to determine "whether the current activity is within the scope of the non-conforming use...." We said, *id.* at 269-70:

> (1) to what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use;
>
> (2) is the current use merely a different manner of utilizing the original non-conforming use or does it constitute a use different in character, nature, and kind;
>
> (3) does the current use have a substantially different effect upon the neighborhood;
>
> (4) is the current use a "drastic enlargement or extension" of the original non-conforming use.

With these principles in mind, we turn to consider the parties' contentions.

The first zoning regulations in Baltimore County took effect on January 2, 1945, "when, pursuant to previous authorization by the General Assembly, the County Commissioners adopted a comprehensive set of zoning regulations." *McKemy*, 39 Md. App. at 259. "Section II of those regulations created seven zones, four being residential, one commercial, and two industrial." *Id.*

Section XI of the original regulations provided for nonconforming uses. The relevant provision stated:

> "A lawful non-conforming use existing on the effective date of the adoption of these regulations may continue, provided, however, upon any change from such non-conforming use to a conforming use, or any attempt to change from such non-conforming use to a different non-

> conforming use or any discontinuance of such non-conforming use for a period of one year ... the right to continue to resume such non-conforming use shall terminate, provided, however, that any such lawful non-conforming use may be extended or enlarged to an extent not more than once again the area of the land used in the original nonconforming use."

Id. at 259-60 (quoting B.C.Z.R., Section XI (1945)).

Baltimore County adopted "a new set of comprehensive zoning regulations" on March 30, 1955. *Id.* at 260. Section 104 of those regulations pertained to nonconforming uses. B.C.Z.R. 104 then stated, *id.*:

> "A lawful nonconforming use existing on the effective date of the adoption of these regulations may continue; 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. No nonconforming building or structure and no nonconforming use of a building, structure, or parcel or land shall hereafter be extended more than 25% of the ground floor area of buildings so used."
> (Emphasis supplied.)

Regulations pertinent to nonconforming uses were again revised on March 15, 1976, by Bill No. 18-1976. In particular, B.C.Z.R. 101 currently provides:

> **NONCONFORMING USE** - A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

Furthermore, B.C.Z.R. 104.1 now states:

> 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.

Here, the Board found that appellant's Property had been used as a "country store" before zoning was implemented in Baltimore County. The parties do not disagree, and there is substantial evidence in the record to support that finding. For example, Dold testified that he maintained the general store from the time he acquired the Property in 1972 until he sold it to appellant in 2002, and he added the lawn mower business in 1972. Further, Commissioner Haines said: "The property was originally used for a commercial purpose in 1915. There was a commercial establishment loosely described as a Feed and Grocery Store which became a Country Store or General Store over the years."

The Board made a threshold determination that the lawn mower operation was a nonconforming use. It then determined that the nonconforming use had been abandoned. In our view, the Board was clearly erroneous in concluding that the lawn mower operation was a nonconforming use. We explain.

The undisputed evidence established that the Property was not used for a lawn mower business when the zoning classification was enacted by the County in 1945. Indeed, such a use was not implemented until 1972. Because, by definition, a nonconforming use is one that predates the enactment of an applicable zoning

ordinance, and is in existence when the zoning law is adopted, *see McKemy*, 39 Md. App. at 266, it follows that the lawn mower business could not have been a nonconforming use; it was not a use that existed in 1945. Instead, it was the Store, which dated to 1915, and existed when the zoning regulations were adopted, that was the nonconforming use. Moreover, the use of the Property for the Store was not abandoned, and so the Store remained a lawful nonconforming use when Hammond acquired the Property.

The Board's erroneous determination that the lawn mower business was a nonconforming use is not just an academic point. As noted, having determined that the lawn mower business was the nonconforming use, the Board went on to find that the use had lapsed. On that basis, it then concluded that appellant was not entitled to operate the lawn mower business.

There is no question that the lawn mower sales and service operation was abandoned for more than a year before Hammond acquired the Property. But, the effect of such a lapse is not necessarily the same if such a use was an intensification of a nonconforming use, rather than a nonconforming use itself.

Given that the Board erroneously characterized the lawn mower business as a nonconforming use, and that ruling was central to its disposition, we cannot uphold the Board's ruling, even if it was correct that the lawn mower business had lapsed for a period of time. This is because an agency's decision may be affirmed based

only on the agency's findings and for the reasons presented by the agency. *United Parcel Service, Inc. v. People's Counsel*, 336 Md. 569, 577 (1994); *Department of Economic and Employment Development v. Lilley*, 106 Md. App. 744, 755-56 (1995).

Therefore, we must vacate the Board's decision and remand for further proceedings. On remand, it is incumbent upon the Board to determine whether the lawn mower business is a lawful intensification of the original nonconforming use. Put another way, the question is whether an intensification may be abandoned when the original nonconforming use has not been abandoned. Because the Board erred in its characterization of the lawn mower business, it never resolved that important question.

Appellant vigorously contends that the Haines Decision made clear that the lawn mower business was an intensification, and he argues that the Board is bound by that ruling. He relies on principles of res judicata and collateral estoppel, noting that the parties here were "essentially the same" as the parties in the 1988 proceeding.

It is not entirely clear that the doctrines of res judicata or collateral estoppel apply with respect to decisions of administrative agencies. *See Weatherly v. Great Coastal Express Co., Inc.*, ____ Md. App. ____, ____, No. 1176, September Term, 2004, slip op. at 15 (filed September 29, 2005); *see also Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth.*, 323 Md. 641,

658-59 n. 13 (1991) (stating that "[i]t is unclear under Maryland law to what extent principles of res judicata and collateral estoppel apply to administrative decisions"); *Murray Int'l Freight Corp. v. Graham*, 315 Md. 543, 549 (1989) (assuming, *arguendo*, that res judicata principles apply to the Commission's decisions, collateral estoppel would not assist the party asserting it); *Mackall v. Zayre Corp.*, 293 Md. 221, 227 (1982) (stating that the Court would "assume, without deciding, that under the circumstances [presented in the case], res judicata or collateral estoppel principles are applicable to ... the [Commission]," because the doctrines would not assist the party asserting them); *Trojan Boat Co. v. Bolton*, 11 Md. App. 665, 668 (1971) (stating that it is unnecessary to decide whether res judicata applies to proceedings before the Commission, because the issue presented could not have been raised in an earlier appeal from a decision of the Commission). *But see Batson v. Shiflett*, 325 Md. 684, 701-03 (1992) (stating that an administrative diecion will be given preclusive effect when (1) the agency was acting in a judicial capacity, (2) the issues on appeal were actually litigated before the agency, and (3) resolution of those issues was necessary to the agency's decision); *State of Md. Cent. Collection Unit v. Kossol*, 138 Md. App. 338, 344 (2001) (agreeing with *Batson*); *Dep't of Human Res. v. Thompson*, 103 Md. App. 175, 195-96 (1995) (noting that the *Batson* Court identified the "test for determining when an agency

decision is entitled to preclusive effect"); II Rickard J. Pierce, Jr., Administrative Law Treatise § 13.3, at 888 (2002) (stating that "[t]he policy in favor of repose that underlies application of res judicata, or claim preclusion, to judicial decisions applies with equal strength to agency adjudications").

Even if we agreed with appellant's construction of the Haines Decision, we hasten to add that it is not at all clear that the business that was the subject of the Haines Decision is, indeed, identical to appellant's proposed business. In deciding whether the Haines Decision is entitled to preclusive effect, that issue looms large.

Because the issue of intensification must be considered on remand, we shall briefly address it. The Court of Appeals discussed the concept of intensification in *Phillips v. Zoning Comm'r*, 225 Md. 102, 110-11 (1961):

> While it is true that mere intensification of a nonconforming use is permissible so long as the nature of use is not substantially changed, it is generally recognized that the right of a landowner to continue the same kind of use to which the property was devoted on the critical date does not confer on him a right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use.
>
> * * *
>
> The reason for disallowing a change from one nonconforming use to another is because the lawful nonconforming use of land "must be held to contemplate only a continuation of substantially the same use which existed at the time of the adoption of the ordinance, and not some other and different kind of nonconforming use

> which the owner of land subsequently finds to be profitable or advantageous." *In Re Botz v. Garrett*, 159 S. W. 2d 367, 372 (Mo. 1942).

See Jahnigen v. Staley, 245 Md. 130, 137 (1967) (stating that the "basic premise underlying zoning regulations is to restrict rather than expand nonconforming uses," but recognizing that "an intensification of a nonconforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used").

The Court of Appeals considered an "extension" of a nonconforming use and an "intensification" of a non-conforming use in *Feldstein v. LaVale Zoning Bd.*, 246 Md. 204 (1967), which involved a nonconforming junkyard. The Court stated:

> The zoning ordinance ... provides that a nonconforming use shall not be extended, but that does not mean that the vested nonconforming use of the junkyard owner could not be lawfully intensified. The chancellors held that the increase in the quantity and height of the stored scrap metal was an intensification and not an extension under the law. We agree.... While a nonconforming use should not be extended or perpetuated longer than necessary, the more frequent present use of property for the same or a similar use than that for which it had been used less frequently theretofore was held to be an intensification and not an extension....

Id. at 211 (citations omitted).

With respect to intensification, *Prince George's County v. F.L. Gardiner, Inc.*, 47 Md. App. 471, 476 (1981), *rev'd on other grounds*, 293 Md. 259 (1982), is also pertinent. There, we said:

> A distinction is to be drawn between the enlargement or extension of non-conforming uses and an intensification of such lawful uses. An increase in

> floor space either arising from an addition to an existing building or in a separate building; the increase in the area of a lot used for non-conforming uses; or a change in business methods or the provision of new accessory facilities with the resulting extension of the use involved have all been held to be proposals for the enlargement of a non-conforming use. Conversely, an increase in the volume of an existing business is usually referred to as an intensification rather than an enlargement and such an intensification has been permitted under a valid non-conforming use.

In *Kastendike v. Balt. Ass'n for Retarded Children, Inc.*, 267 Md. 389 (1972), the Court determined that a change in use of a nonconforming nursing home, from treating alcoholics and the elderly to treating mentally retarded adults, did not amount to a zoning violation. In considering whether the change was a lawful intensification of the prior uses, the Court explained that "the similarities between the various uses of the premises as a nursing home are greater than the differences and the changes, if any, in the type of patients cared for are inconsequential." *Id.* at 398. Accordingly, the Court said: "Neither the change in ownership nor change from treatment of the aged or alcoholic to care of the mentally retarded eradicated or acted to extend the non-conforming use." *Id.* at 404-05. The Court concluded that, "since the use as a nursing home from 1946 until [The Baltimore Association for Retarded Children, Inc.] started operation was continuous and was never abandoned, the lawfully existing non-conforming use is permitted under the new zoning ordinance." *Id.* at 404.

See also Helfrich v. Mongelli, 248 Md. 498, 504 (1968) (applying doctrine to permit a business to enclose a porch on its

premises); *Nyburg v. Solmson*, 205 Md. 150, 161 (1954) (holding that nonconforming use for operation of garage, storing cars, and selling gasoline could expand to include storage of new cars before shipment to dealership; to do so was "not an extension but merely an intensification of a long continued non-conforming use"); *County Comm'rs of Carroll County v. Zent*, 86 Md. App. 745, 753 (1991) (surveying Maryland cases applying the doctrine of extension-intensification to nonconforming uses); *Wilson v. Mayor & Comm'rs of the Town of Elkton*, 35 Md. App. 417, 426 (1977)("Distinguished from a prohibited *extension* of a non-conformng use is what the courts will look upon as a mere intensification of the existing lawful use."); Norman Williams, Jr. & John M. Taylor, *American Land Planning Law* §121:8 (2005) ("In view of the difficulty of keeping track of increases in the volume of business, such expansion is not regarded as enlargement but as "intensification," and the courts have not interpreted the usual restrictions on expansion of nonconforming uses to prohibit intensification").

Appellant also disputes that the Haines Decision established the right to service on the Property only those lawn mowers sold on site. He argues:

> Was Dold's [Lawn Mower Sales & Service] to run a title check on a lawn mower before repairing it? Who keeps a sales receipt for a lawn mower purchased years ago? Dold's operation lasted from 1972 to 1989, a period of seventeen years. Did Commissioner Haines really think that Dold's [Lawn Mower Sales & Service] kept track of every mower sold over those seventeen years and only serviced mowers purchased from them?

In appellant's view, if the Haines Decision intended to limit repairs to lawn mowers purchased on site, it "would be invalid as being arbitrary and capricious since it is not based on testimony in the record." Appellant also looks to the Order that accompanied the Haines Decision, noting that it did not contain such a restriction.

Conversely, Jung claims that the Haines Decision "plainly limits the repair of mowers to those that were sold on the site." She avers that "[i]t was Commissioner Haines [sic] attempt to put limits on the type of business allowed on this property which is located in the middle of a residential neighborhood." In her view, "[t]he limitation, read in context with the remaining paragraph, was intended to ensure that the operator could not become a service center for fleets of commercial mowers."

Further, Jung asserts: "The fact that this limitation was misinterpreted by the owner as well as the neighbors in 1989 has no relevance to the present case." She contends that, "[i]f the owners of the property in 1989 were dissatisfied with or confused by Commissioner Haines' opinion or felt that it was arbitrary or capricious, they should have filed an appeal in 1989." Because they failed to do so, argues Jung, Commissioner Haines's "limitation should be fully enforced by this Court."

Moreover, appellee contends that the text of the Haines Decision is "an important tool for discerning the reasoning...." Therefore, she does not attach any significance to the omission

from the Order of a limitation on repairs of mowers to those purchased on site.

We agree with appellant that the Haines Decision cannot reasonably be construed to limit repairs of lawn mowers to those "sold on site." If that had been the intent of the Commissioner, he would have included that restriction in his Order. And, because it was not part of the Order, there would have been no reason to challenge on appeal something that was not ordered.

Moreover, had such a finding been made, it would have been unsupported by the undisputed evidence; Dold testified, without contradiction, that he did not limit his repairs to mowers sold on the site. Jung acknowledged as much at the hearing below. As we see it, such an interpretation is also plainly inconsistent with common sense, because it would be far too difficult to administer or enforce.

III.

Appellant contends that he "is entitled to the use by reason of vested rights or estoppel," because "of the change in the County's position." He asserts:

> The Haines ruling clearly held that lawn mower sales and service was permitted under the aegis of the country store use. The subsequent decision of the Board of Appeals and the Circuit Court held, contrary to the Haines ruling, that the lawn mower sales and service was a separate non-conforming use and lapsed if not used. The Moxley letter constituted a written determination that the lawn mower sales and service was permitted without any qualifications. Then, after a community group raised objections, Moxley changed his mind and advised that only lawnmowers purchased on the site could

be repaired. The Board of Appeals went far beyond the Moxley change of mind and held, contrary to the Haines ruling and the Moxley letter, that the use had expired.

Hammond's acquisition of the property and a year's worth of work did not take place in a vacuum. He relied on Moxley's letter. And Moxley himself did not just sit down and dream up his response. He in turn relied on the Haines ruling, particularly the order which he literally re-stated.

According to appellant, "where a [zoning law] change occurs, persons who have ... relied on the prior zoning by obtaining a permit and doing work in reliance on that permit are protected ... by the Maryland law of vested rights/estoppel." He also maintains that he has vested rights in the lawn mower sales and service business because of the substantial construction that he undertook. In particular, he points out that he "replaced the electrical and plumbing, put in a roll down door, hauled away 30-40 truckloads of demolition materials, and removed the greenhouse." As Hammond points out, appellee conceded as much, agreeing that Hammond "'worked like a dog' to get the place ready."

In a related argument, appellant contends that the doctrine of "estoppel" applies here. Apart from his reliance on Moxley's assurances, he states: "Since Haines had the authority to make the ruling, the correct zoning was as set forth in his ruling, up until the time a different ruling was made by the Board of Appeals. The zoning was changed. All the elements are there for the application of vested rights/estoppel."

Appellee counters that vested rights and estoppel "are two

distinct doctrines." She explains: "The law of vested rights applies only to situations where a property owner is issued a permit by the County and in good faith reliance on that permit begins substantial construction that is visible to the public." Jung adds that the "property owner obtains a vested right in continuing construction even when the County subsequently changes the zoning classification on the subject property."

According to appellee, however, the "factual situation in the present case is not suited to a defense of vested rights because Mr. Hammond relied on the advice of Mr. Moxley not on a validly issued permit and there was not a change in the zoning classification of the property." She asserts: "Both are essential elements for the defense of vested rights."

Moreover, Jung maintains that the doctrine of equitable estoppel cannot defeat a municipality's enforcement of its own ordinances because of an error of its agent, on which a third party may have relied. In this regard, she observes: "Maryland Courts have been reluctant to recognize estoppel in the area of zoning." Noting that "[a]dministrative negligence is not enough," appellee also asserts: "The law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the county official, zoning estoppel does not apply." In appellee's view, there was no evidence that Moxley "acted in an arbitrary, egregious or capricious manner."

In addition, appellee contends that appellant "should

certainly been [sic] on notice that Mr. Moxley was not infallible." Indeed, she suggests that appellant "relied on that advice at his own peril." According to Jung, Hammond

> could have requested a hearing by the Zoning Commissioner prior to purchasing the property pursuant to Baltimore County Zoning Regulation 550.7 to clarify the permissible use of the property. He could have consulted an attorney. He could have read the Opinion and seen the restrictions himself.

In the instant case, the Board declined to consider appellant's estoppel claim. It stated:

> [T]his Board has clearly and traditionally been limited in its jurisdiction to those subject areas specifically granted to it under statute. We are not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by Petitioner in this case for consideration.

Without a ruling from the Board, we are unable to conduct our judicial review function. Therefore, on remand, in the event that the Board determines that appellant's business is not a lawful intensification, it should proceed to address appellant's estoppel and vested rights contentions, and determine whether they apply here to protect appellant.

We pause to note, for the Board's benefit, that "[z]oning estoppel is the theory of equitable estoppel applied in the context of zoning disputes. *Sycamore Realty v. People's Counsel*, 344 Md. 57, 63 (1996). It is used "to achieve equitable results in zoning disputes between the government and its property owners." *Id.; see County Council v. Offen*, 334 Md. 499, 505 n.4 (1994). As this Court has said, zoning estoppel "is a legal defense rather than an

equitable remedy, and may be adjudicated during administrative proceedings." *Relay Improvement Assoc. v. Sycamore Realty Co., Inc.*, 105 Md. App. 701, 716 (1995), *aff'd*, 344 Md. 57 (1996). The *Relay* Court explained that the Court of Appeals has "applied the doctrine of equitable estoppel in the context of zoning matters" only on "rare occasions...." *Id.* at 723.

The related doctrine of vested rights is "derived from principles of common and constitutional law...." *Sycamore Realty*, 344 Md. at 67. It provides that "a landowner may rely on nothing other than a properly-issued permit, and that a substantial change in circumstances will not be found unless the landowner begins actual, above-ground construction." *Relay*, 105 Md. App. at 725. *See generally Marzullo v. Kahl*, 366 Md. 158 (2001); *Prince George's County v. Sunrise Dev. Ltd. P'ship*, 330 Md. 297 (1993); *Permanent Financial Corp. v. Montgomery County*, 308 Md. 239 (1986); *County Council for Montgomery County v. District Land Corp.*, 274 Md. 691 (1975); *Rockville Fuel & Feed Co. v. Gaithersburg*, 266 Md. 117, 127 (1972); *Richmond Corp. v. Board of County Comm'rs for Prince George's County*, 254 Md. 244, 255 (1969); *Prince George's County v. Equitable Trust Co.*, 44 Md. App. 272, 278 (1979).

IV.

Finally, appellant argues that, "[u]nder standard contract principles, Mr. Hammond contracted with the County for a determination." According to appellant: "Both consideration - the

$40.00 fee - and performance - the Moxley letter - were present." Further, citing "Maryland Code Ann., Art. 25A § 1A," appellant claims that "[t]he traditional government defense of sovereign immunity against contract actions is unavailing" because "[c]harter counties such as Baltimore County are forbidden from raising sovereign immunity as a defense in actions in contract."

Citing *Leaf Co. v. Montgomery County*, 70 Md. App. 170 (1987), appellant contends that "[t]here is no question that a local government can be estopped to repudiate a contract." He also claims: "Estoppel often fails on the lack of authority to enter into the contract, the courts holding that citizens are responsible for knowing the limits of the authority of the contracting officer. Schaefer v. Anne Arundel County, 16 F.3d 711 (1994)." Moreover, appellant asserts that "the County held itself out as able to give determinations as to what was the permissible zoning." He claims: "Since Article 25A, Section 1 A prohibits the defense of sovereign immunity in contract actions, it follows that it may not be relied on here."

Appellee disputes that there was a contract between the County and appellant. Even if there was a contract, she maintains that "Mr. Hammond's remedy is to sue Baltimore County, not to make the neighborhood live with a lawn mower business because Mr. Moxley made a mistake."

Moreover, appellee contends that, "because the Zoning Regulations give property owners the option of requesting a Hearing

pursuant to BCZR 500.7, ... the contract is unenforceable because it violates public policy." Appellee explains that the Baltimore County Zoning Regulations "offer a prospective land owner who desires a clarification of a permissible use" the option "to petition the Zoning Commissioner" for such an answer. Further, appellee notes that "[t]his procedure requires advertisement so that interested parties can participate as well as a public hearing." According to appellee, "[t]his procedure is designed so that all affected property owners can have their opinions known." She argues that "[t]his is quite different from Mr. Hammond procuring an opinion from a County Planner without the knowledge of the surrounding property owners."

As with appellant's estoppel and vested rights claims, the Board did not render a ruling on appellant's contract claim. However, the Board need not consider appellant's contract claim on remand. Under the facts presented here, we see no basis for a contract claim.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY VACATED. CASE REMANDED WITH INSTRUCTIONS TO REMAND TO THE BOARD OF APPEALS FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 50% BY APPELLANT, 50% BY APPELLEE.

County Board of Appeals of Baltimore County

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

November 18, 2005

John C. Murphy, Esquire
516 N. Charles Street
Suite 206
Baltimore, MD 21201

RE: *In the Matter of: James G. Hammond*
Case No. 03-366-SPH /On Remand

Dear Mr. Murphy:

This will acknowledge receipt of your letter dated November 16, 2005 regarding the remand of the subject matter to the Board of Appeals pursuant to the Court of Special Appeals decision filed November 15, 2005.

Upon receipt of an Order from the Circuit Court for Baltimore County remanding this matter to the Board of Appeals by order of the Court of Special Appeals, appropriate notice will be given and the matter handled in a timely manner. Please note that we will also await the return of the Board's complete file from the Court of Special Appeals via the Circuit Court.

Should you have any questions, please contact me at 410-887-3180.

Sincerely,

Kathleen C. Bianco
Administrator

c: Barbara Jung
James Hammond
Office of People's Counsel

Printed with Soybean Ink on Recycled Paper

Law Offices
John C. Murphy

John C. Murphy
516 N. Charles St., Suite 206
Baltimore, Md. 21201
jcmurphy@bellatlantic.net
410-625-4828
443-956-8711
Fax 410-625-0273

November 16, 2005

Lawrence M. Stahl, Esq.
Baltimore County Board of Appeals
400 Washington Avenue
Towson, Md. 21204

Re: In the Matter of James G. Hammond
Case number 03-366-SPH

Dear Mr. Stahl:

I am enclosing a copy of the decision of the Court of Special Appeals remanding the above matter to the Board of Appeals for further proceedings. It is my request that the Board set the matter in for hearing at the earliest practicable time. The administrative proceedings have been pending for almost three years and this is a great hardship on the applicant.

If there is anything I need to do as the attorney for the applicant in connection with the rehearing, please let me know.

Thank you and best wishes.

Sincerely,

John C. Murphy

Cc: Ms. Barbara Jung
Mr. James Hammond

RECEIVED
NOV 17 2005
BALTIMORE COUNTY
BOARD OF APPEALS

8/2/04

PETITION OF JAMES G. HAMMOND FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- CASE No: 03-366-SPH	)	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY Case No.: 03-C-03-12458

STIPULATION

Petitioner, James G. Hammond, by his attorney John C. Murphy, and Barbara Jung, Respondent, stipulate that the transcript of the hearing before Judge Hennegan is not necessary for the appeal as it was legal argument only.

John C. Murphy
516 N. Charles Street, Suite 206
Baltimore, MD 21201
(410) 625-4828
Attorney for the Petitioner

Barbara Jung
11939 Falls Road
Cockeysville, MD 21030
410-512-206
Respondent—Pro Se

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John Cannan

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August 2, 2004

Civil Clerk
Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, MD 21204

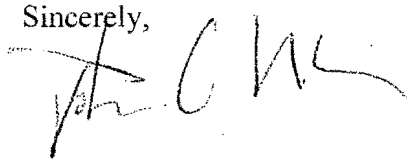
Re: Appeal in
Case No.: 03-C-03-12458
Petition of James G. Hammond

Dear Clerk:

Enclosed is a stipulation to be filed in the above referenced case. Please timestamp the enclosed copy and return it to me in the self-addressed stamped envelope.

Thank you for your assistance in this matter.

Sincerely,



RECEIVED
AUG 05 2004
BALTIMORE COUNTY
BOARD OF APPEALS

cc: Baltimore County Board of Appeals
Ms. Barbara Jung

7/7/04

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY	*	
	*	
IN THE MATTER OF: JAMES G. HAMMOND	*	**CIVIL ACTION Case no: 03-C-03-012458**
PETITION OF JAMES G. HAMMOND	*	
	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	
	*	
BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse 400 Washington Avenue Towson, MD 21204	*	
	*	

* * * * * * * * * * * *

OPINION AND ORDER

This case comes to the Circuit Court for Baltimore County as administrative appeal from the ruling of the Board of Appeals of Baltimore County.

In 2001, Mr. James Hammond, Petitioner, wanted to purchase the Ridge Country Store to re-establish lawn mower sales and service in which the store had once participated. In accordance with Baltimore County's procedure, Petitioner wrote a "letter of spirit and intent" describing Petitioner's proposed use of the property to Arnold Jablon, Director of Permits and Development Management for the Baltimore County. The County indicates in its response that the lawn mower operation is a permissible nonconforming use.

The community association, after becoming aware of the County's letter, raised objections to the lawn mower operation. Due to the objection, the Baltimore County

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PH Murphy, Jung, Bos

Zoning authority stated that Petitioner could only repair those lawn mowers previously purchased at the site. Petitioner then filed a petition with the Deputy Zoning Commissioner, Timothy Kotroco, requesting a special hearing.

On April 11, 2003, the Deputy Commissioner Kotroco denied Petitioner's request to service mowers not sold on site. Petitioner appealed the Commissioner's decision and on October 17, 2003, the Board of Appeals (hereinafter Board) found that the lawn mower repair shop was an abandoned use pursuant to Baltimore County Code Section 104.1. The Board also denied the Petitioner's request for a rehearing on November 5, 2003. Petitioner therefore, filed a timely appeal in the Circuit Court for Baltimore County.

Facts

Since 1915, the Ridge Country Store has operated on Falls Road. Over the years, the store sold feed, groceries, hardware, plants and trees, landscaping, gasoline, lawn and garden equipment. From 1972 until 1988, Robert Dold operated a lawn mower repair shop in the rear of the store. In 1988, Mr. Dennis Peddy wanted to lease the entire property from Robert Dold for flowers, plants, and related supplies. Prior to leasing the property, however, Mr. Peddy applied to the Zoning Commissioner, J. Robert Haines, for authorization of the nonconforming use. Mr. Haines clarified the permissible uses and authorized the nonconforming use. Thereafter, Mr. Dold ceased operation of the lawn mower repairs and leased the property to Mr. Peddy.

In 2001, Petitioner wanted to purchase the Ridge Country Store to re-establish the lawn mower sales and service uses. In accordance with Baltimore County's procedure, Petitioner wrote to the County a "letter of spirit and intent," which described the

proposed use. In response to the letter, the County wrote to the Petitioner that the lawn mower operation is a permissible nonconforming use pursuant to Commissioner Haines' 1988 decision.

Relying on the County's letter, Petitioner purchased the property, working for a year to repair the property and get it ready for business. The community association, however, raised objections to Petitioner's re-establishment of the lawn mower sales and service operation. The County responded to the community's apprehension by limiting the operation to the repair of lawn mowers previously purchased at the site. Petitioner therefore, filed a petition with the Deputy Zoning Commissioner, Timothy Kotroco.

On April 11, 2003, the Deputy Commissioner Kotroco denied Petitioner's request to service mowers not sold by him on the property. Petitioner appealed the Commissioner's decision. On October 17, 2003, the Board found that due to the ceasing of the lawn mower operation after 1988, the lawn mower repair shop had been abandoned pursuant to Baltimore County Code Section 104.1. Furthermore, the Board refused to consider the estoppel argument and denied the Petitioner's request for a rehearing on November 5, 2003, based on finding no evidence of fraud, irregularity or mistake.

ISSUE

This Court will consider three issues for review:

1. Does the zoning ordinance prohibit lawn mower sales and service on the site as a lapsed nonconforming use?
2. Does the Petitioner have the right to use the property for lawn mower sales and service as a result of permissible intensification?

3. Is Baltimore County estopped from preventing Petitioner from using the property at issue for a lawn mower sales and service?

STANDARD OF REVIEW

The Court of Special Appeals of Maryland, in Maryland Department of Education v. Shoop, explains that the standard of review of the Court of Special Appeals for decisions of administrative panels is precisely that of the circuit court. 119 Md. App. 181, 196, 704 A.2d 499 (citing Dep't of Human Res. v. Thompson, 103 Md. App. 175, 188, 652 A.2d 1183 (1995)), cert. denied, 349 Md. 495, 709 A.2d 140 (1998). The appellate court reviews appeals from such panels under a two-tiered scheme. Dep't of Health & Mental Hygiene v. Reeders Mem'l Home, Inc., 86 Md. App. 447, 452, 586 A.2d 1295 (1991).

The appellate court examines the panel's findings of fact under the substantial evidence test. Id. The appellate court cannot, however, substitute its judgment for that of the administrative panel. Zeitschel v. Bd. of Educ., 274 Md. 69, 82, 332 A.2d 906 (1975). As for the appellate court's review of the findings of law, when no such deference is appropriate, it may substitute its judgment for that of the administrative panel. Shanty Town Assoc. v. Dep't of the Env't, 92 Md. App. 103, 116, 607 A.2d 66 (1992); see Younkers v. Prince George's County, 333 Md. 14, 19, 633 A.2d 861 (1993) (citing People's Counsel v. Md. Marine Mfg. Co., 316 Md. 491, 496-97, 560 A.2d 32 (1989)).

Furthermore, for a reviewing court to uphold an administrative hearing board's order, the order must be sustainable on its findings of fact and for the reasons stated by the agency. See Regan v. Bd. of Chiropractic Exam'rs, 120 Md. App. 494, 508-09, 707

A.2d 891 (1998). Indeed, on appeal the court asks whether a reasoning mind reasonably could have reached the factual conclusion that the agency reached. Eberle v. Balt. County, 103 Md. App. 160, 166, 652 A.2d 1175 (1995) (quoting Hill v. Balt. County, 86 Md. App. 642, 659, 587 A.2d 1155 (1991)).

The reviewing court, however, must not go beyond the findings of fact of the administrative hearing. See Supervisor of Assessments v. Ely, 272 Md. 77, 321 A.2d 166 (1974). The Court of Appeals held that judicial review of the act of the administrative agency "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." Id. Furthermore, it is not only within the province of the agency to resolve conflicting evidence, but to also draw the ruling inference. See Bulluck v. Pelham Wood Apts., 283 Md. 505 (1978). As such, the reviewing court is bound to the record of the administrative hearing. Id.

DECISION

1. **Does the zoning ordinance prohibit lawn mower sales and service on the site as a lapsed nonconforming use?**

Petitioner argues that the zoning ordinance does not prohibit lawn mower sales and service on the site because the sale and service of lawn mowers is not a nonconforming use. Petitioner asserts that the lawn mower operation was not a use of the property until 1972, which proceeded the zoning ordinance of 1945. Therefore, Petitioner states that if the lawn mower operation had been a nonconforming use, then it would not have been permitted in 1972.

As stated in section 104.1 of the Baltimore County Zoning regulations,

> A nonconforming use (as defined in section 101) may continue except as otherwise 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.

Petitioner argues that section 104.1 does not apply to the lawn mower sales and service and so, it was not an abandoned use. If the lawn mower operation had been a nonconforming use, than "upon the change from the general store to the lawn mower sales and service, it would have terminated as well." (Pet'r Mem. at 6.)

When the lawn mower operation began in 1972, it did not conform to the "use regulation for the zone in which it is located or to a special regulation applicable to such a use." Baltimore County Zoning Regulations, § 101 at 1-22. As Commissioner Haines stated in his 1988 order[1], the lawn mower sales and service was a nonconforming use. Op. Comm'r Haines Case no. 89-204-SPH at 7 (1988). Thus, as a nonconforming use, the lawn mower operation was not a favored use. County Council of Prince George's County v. E.L. Gardner Inc., 293 Md. 259, 443 A.2d 114 (1982).

In the instant case, the lawn mower operation ceased for over a year. As stated by the Court of Appeals in Gardner, the zoning authorities of each county have the right to limit the ability of the property owner to change, expand, alter or recommence after the cessation of a nonconforming use. Id. at 268; see Mayor & City Council of Baltimore v. Dembo, Inc., 123 Md. App. 527, 538, 719 A.2d 1007 (1998). A judicially approved method of eliminating "a nonconforming use is to require that it terminates if legally abandoned for a specified period of time." Dembo, Inc., 123 Md. App. at 539. In fact, Maryland courts have looked so favorably to the public purpose served by the discontinuance and abandonment of nonconforming uses that "[a]bandonment does not

[1] In Commissioner Haines' opinion, he refers to the lawnmower operation as an intensification. In his order, however, Commissioner Haines identifies the lawnmower operation as a nonconforming use.

depend upon the landowner's intent, but upon whether the property owner failed to use the property for the time period specified in the zoning ordinance that defines abandonment." Id. at 539 (citing Catonsville Nursing Home, Inc. v. Loveman, 349 Md. 560, 582, 709 A.2d 749 (1998)).

In the case at bar, it is undisputed that after the lawn mower operation ceased, the rear of the property was used as an antique/gift shop. Therefore, this Court finds the lawn mower operation was an abandoned nonconforming use in accordance with section 104.1.

2. **Does the Petitioner have the right to use the property for lawn mower sales and service as a result of permissible intensification?**

Petitioner claims that the lawn mower operation is a permissible intensification of a prior nonconforming use. Petitioner argues that by applying section 104.1 to the facts of this case, the nonconforming use that may be terminated by discontinuance or abandonment would be the country/general store and not the lawn mower sales and service operation. (Pet'r Mem. at 6.) To support his argument, Petitioner cites Commissioner Haines' 1988 decision in which Mr. Haines found that the "lawn mower sales and service was not a separate use but rather an intensification of the general store use." Id.

Petitioner further asserts that Maryland case law allows for the reasonable intensification of a nonconforming use. See County Comm'rs v. Zent, 86 Md. App. 75 (1991). In Zent, the court held that "any proper incidental use of [a] business" is an authorized intensification. Id. at 750. Hence, Petitioner argues that the lawn mower operation is a reasonable intensification of the original nonconforming use of a general store.

The Court of Appeals in Jahnigen v. Staley states that "an intensification of a non-conforming [sic] use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used." 245 Md. 130, 137, 225 A.2d 277 (1967) (citing Phillips v. Zoning Commissioner, 225 Md. 102, 110, 169 A.2d 410 (1961)). A landowner has the right "to continue the same kind of use to which the property was devoted." Zent, 245 at 138 (citing Phillips, 225 Md. at 110). The landowner, however, does "not confer on him the right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the proper existing use." Id.

Petitioner's claim that the lawn mower operation is an intensification of the general store is without merit. Subsequent to the termination of the lawn mower operation in 1988, the store reached a juncture upon which the character of its operations significantly changed. The store's uses were limited to selling food (Tr. at 35, 92-3) and antiques/gifts. (Tr. at 116, 123.) Thus, by allowing the lawn mower operation to start up again, this Court would permit the change of the nature and character of the most recent uses of the property. Therefore, this Court finds that the lawn mower is not an intensification of the existing nonconforming use, but an impermissible change in the use of the property.

3. **Is Baltimore County estopped from preventing Petitioner from operating a lawn mower sales and service?**

Petitioner claims that his reliance on the County's letter to the Petitioner, which indicates that the lawn mower operation is a permissible nonconforming use pursuant to Commissioner Haines' 1988 decision, estops the County from preventing that use on the property. Petitioner argues that the County's letter "was not some casual statement by a

County employee, but rather a definite procedure which the County instituted to give assurance about zoning. [Petitioner] was advised by the County that this was the method to obtain a clear resolution of what uses were allowed." (Pet'r Mem. at 17.)

In support of his argument, Petitioner cites Permanent Fin. Corp. v. Montgomery Cty., 308 Md. 239, 518 A.2d (1986) in which the Court of Appeals defined estoppel:

> Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

Id. at (citing 3 J. Pomeroy, Equity Jurisprudence § 804 (5th ed. 1941)).

Petitioner contends that the doctrine of estoppel applies to municipalities where "positive acts by such [municipal] officers [] induced the action of the adverse party. It must appear, moreover, that the party asserting the doctrine incurred a substantial change of position or made extensive expenditures in reliance on the act." (Pet'r Mem. at 18 (citing Permanent Fin. Corp., 308 Md. at 248-49)).

The Petitioner's claim, however, is without merit. The instant case is distinguishable from Permanent Fin. Corp. because it "does not turn on the ambiguity vel non of a county ordinance which was subject to two reasonable interpretations." Marzullo v. Kahl, 366 Md. 158, 194-95, 783 A.2d 169 (2001). Rather, this Court must determine whether Baltimore County may be estopped from preventing a violation of the zoning ordinance. The Court of Appeals noted in Marzullo,

> no principle is better settled than that persons dealing with a municipality are bound to take notice of limitations upon its charter powers. . . . Consequently, "[e]veryone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done

> without legal authority." Lipsitz v. Parr, 164 Md. 222, 228, 164 A. 743 (1933) . . . . Therefore, the doctrine of equitable estoppel "cannot be ... invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment." Lipsitz, 164 Md. at 228. [Furthermore,] . . . estoppel cannot make lawful a municipal action which is beyond the scope of its power to act or is not executed in compliance with mandatory conditions prescribed in the charter. In other words, the doctrine of equitable estoppel cannot be invoked to defeat a municipality's required adherence to the provisions of its charter simply because of reliance upon erroneous advice given by an official in excess of his authority. . . . [Thus,] it cannot matter that a party relies upon erroneous official advice to its detriment.

366 Md. at 194-95 (citations omitted).

In the instant case, Petitioner relies upon the Baltimore County letter to his own detriment. Petitioner accepted the approval at his own risk. The operation is an abandoned nonconforming use and therefore, a violation of the zoning ordinance. "[V]iolation of zoning ordinances are unlawful and cannot be grounds for estopping a municipality from enforcement of the ordinance." Id. at 199. Therefore, Baltimore County's mistake cannot estop it from enforcing the zoning regulations.

Petitioner asserts that he has a vested right in the lawn mower operation. Petitioner claims that he obtained a vested right once he made substantial investments in the property. (Pet'r Mem. at 18-20.) The law of vested rights, nevertheless, does not support Petitioner's argument. The Court of Appeals defines vested rights as those rights, which have

> a constitutional foundation [and which] rest[] upon the legal theory that when a property owner 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. . . . [Vested] [rights] [however,]"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."

Marzullo, 366 Md. at 192-93 (quoting Rockville Fuel & Feed Co. v. Gaithersburg, 266 Md. 117, 127, 291 A.2d 672 (1972)).

In the case at bar, it is not enough that Petitioner purchased the property, spent "significant funds and perform[ed] significant work in reliance upon these determinations." (Pet'r Mem. at 22.) As stated by the Court of Appeals, there must be "substantial construction" on the property. Petitioner, however, does not present substantial evidence that he performed substantial construction on a permitted use. Furthermore, the County official's letter to Petitioner, which indicates that the operation is a permissible nonconforming use, did not create "a vested right because there [was] no change . . . in the zoning law itself [;] the permit was improperly issued." Marzullo, 366 Md. at 193. Therefore, this Court finds that Petitioner is not entitled to a vested right in the nonconforming use of a lawn mower operation.

Overall, this Court holds that there was substantial evidence for the Board of Appeals' finding that the lawn mower operation was an abandoned nonconforming use and not an intensification. Furthermore, for the reasons cited above, the Petitioner's argument on estoppel must fail. Therefore, after careful review of all of the evidence, submitted memoranda, oral arguments, and all applicable law, it is **ORDERED** this 17 day of July 2004, that the decision of the Board of Appeals is hereby **AFFIRMED**.

John O. Hennegan, Judge

Cc: James G. Hammond
John C. Murphy

3/8/04

PETITION OF JAMES G. HAMMOND FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- CASE No: 03-366-SPH	)	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY Case No.: 03-C-03-12458

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BOARD OF APPEALS

PETITIONER'S REPLY MEMORANDUM

James G. Hammond, Petitioner, by his attorneys, John C. Murphy and John Cannan, submits the following Reply in response to the memorandum submitted by the Respondent, Barbara Jung.

FACTS

Ms. Jung faults Mr. Hammond for not requesting a Special Hearing, and says in her memorandum at page 2:

> "...if Mr. Hammond had requested a Special Hearing to establish a permissible use, as Mr. Dold had done, it would have been advertised and in a public hearing, the neighbors would have had the opportunity to be heard".

Is it really fair to chastise Mr. Hammond for not requesting a public hearing? The County advised him that the procedure was to submit the Letter of Spirit and Intent along with the check for $40.00 to Mr. Jablon. T-29 (references are to the transcript attached to Petitioner's Memorandum as Exhibit 1).

As a matter of common sense, why in the world would Mr. Hammond request a special hearing for lawn mower sales and service when an order of

Commissioner Haines existed stating that lawn mower sales and service was a permissible use on the property? This was no doubt the reason that Mr. Moxley did not suggest a special hearing to Hammond when he was investigating the uses allowed on the Property.

Mr. Dold conducted the lawn mower sales and service for 15 years before requesting a special hearing. Mr. Hammond first sought the written determination of the County and then a Special Hearing, -- all before ever starting his lawn mower sales and service business. And Mr. Hammond was to follow Mr. Dold's example?

Ms. Jung makes much of the condition of the property—piles of junk—but she does not relate the whole story. The property was indeed a mess when Mr. Hammond purchased it. According to Mr. Hammond, he "hauled away at least thirty forty truckloads of debris that was left there by the previous tenant". T. 36. According to Ms. Jung, Mr. Hammond "worked like a dog" cleaning up the property and she had no problem with its present appearance. T. 106. She relates what Mr. Hammond told another neighbor, Mr. Sadofsky, but she doesn't relate that Mr. Hammond refused to work on his car because he wasn't zoned for auto repair. T. 63 She complains about his projected hours, but she doesn't relate that he offered to limit the hours in an agreement which Mr. Hammond had his attorney prepare. T. 48, referring to Exhibit F of Petitioner's Memorandum.

The mystery about the facts as related by Ms. Jung is that her sole complaint is about noise but Mr. Hammond has never even started his business.

She complains of " noise that I hear coming from there, that I didn't hear from Bob's (Dold)." T. 106 What Mr. Hammond did do was to renovate the store in the front of the property and the building in the rear – "gutted the interior of the building (the store), replaced plumbing, electrical, etc; and for the building in the rear, completely rewired, completely plumbed, "a terrific amount of demolition". T. 36 And this was all before ever starting his lawn mower business, which he has never started. T. 36. It seems certain that the noise Judge Jung complains about had nothing to do with the lawn mower sales and service business – which never started-- but instead with his total renovation of the Property, including the "terrific amount of demolition" which Mr. Hammond performed.

The basic fact is that the lawnmower use existed for 15 years, without objection, by Mr. Dold. Ms. Jung was a customer. Dold's was apparently in operation when Ms. Jung moved into the neighborhood. Now Mr. Hammond is seeking to re-establish this very same business. Ms. Jung is unwilling to give Mr. Hammond the same chance that Mr. Dold had because of fears of noise, which she heard emanating not from the lawnmower business but, quite apparently, from the terrific amount of work necessary to restore the Property.

ARGUMENT

1. THE LAWNMOWER SALES AND SERVICE WAS AN INTENSIFICATION OF A NON-CONFORMING USE, NOT AN INDEPENDENT NON-CONFORMING USE, AND COULD NOT LAPSE WITHOUT ABANDOMENT OF THE PRIMARY NON-CONFORMING USE.

Ms. Jung cites cases that a non-conforming use ceases when it is changed to another use. Agreed. That is what 104.1 of BCZR says. It is the rule for non-conforming uses. But the lawnmower business is not a non-conforming use. If it was, it could never have been established in 1972 since it didn't precede the zoning, which came to Baltimore County in 1945. Commissioner Haines addressed this very point in his 1988 ruling:

> Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. The lawn mower sales and services is a change, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply Operation. Haines Opinion at p. 6 attached as Exhibit A to Petitioner's Memorandum. Emphasis supplied)

Haines also described lawnmower sales and service as an operation ancillary to the nonconforming use of a Country Store in the order of his decision:

> THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 30th day of November 1988 that the Petition for Special Hearing to approve a nonconforming use for a Country Store, with Food and Grocery sales and Deli operation, Household Hardware, and Lawnmower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Land and Garden Supplies and Equipment for sale...is hereby granted. Haines Opinion at p. 6 attached as Exhibit A to Petitioner's Memorandum.

By the plain language of the Haines order, lawnmower sales and service is an operation that exists as a result of the Country Store use. The activity is an intensification or accessory use, but it is not a non-conforming use. If lawn mower sales and service was a permissible intensification back in 1988, it is a permissible intensification now for the very same property under the principles of administrative res adjudicata. White v. Prince George's County, 282 Md. 641, 658 (1978) If Ms. Jung was dissatisfied with the decision back in 1988, she should have appealed it then. She did not object to the use back in 1988, but she objects now. The legal issue is identical,--the right to intensify the country store use by the lawn mower sales and service.

The most instructive opinion of the appellate courts was not cited by Judge Jung. It is County Comm'rs v. Zent, 86 Md. App. 745 (1991) There Judge Cathell provided a comprehensive review of the law dealing with intensification and uses accessory to non-conforming uses. The case concerned a milk distribution business and the storage of vehicles incident to that business. The Court held that the Zoning Administrator:

> "Had no authority to terminate the milk distribution business nor any proper incidental use of that business". Zent, 86 Md. App. 749

The correct result is that a non-conforming use, which essentially gives the right to operate a hardware store, carries with it the right to do repairs of the types of neighborhood equipment associated with a hardware store or a lawn and garden supply business. As Commissioner Haines held back in 1988, the particular uses

can come and go, but the basic use remains. Lawnmower sales and service are not customary with a lawn and garden supply business? The contention doesn't fly.

Another jurisdiction has held, in a case with facts closely similar to this one, that such a use can be restored where the primary non-conforming use has continued. Gauthier v. Vil. Of Larchmont, 291 N.Y.S.2d 584 (1968), mot. for lv. to app. den. 22 NY2d 646 (1968) (attached). Gauthier involved the primary non-conforming use of a hotel and an accessory use of a bar, which would have been a non-conforming use had it been an independent use. The bar was voluntarily shut down for six years before the hotel owner sought to reopen it. The Village argued, as the Board and Respondent do in the instant case, that the bar use was a non-conforming use and had been abandoned. The Court dismissed this contention as meritless:

> The village further contends that the bar does not have status as a vested nonconforming use because it was not being used when the ordinance was enacted. However, the contention is meritless in a situation where the principal use was in existence prior to the zoning ordinance and was not abandoned (cf. Curtiss-Wright Corp. v. Incorporated Vil. of Garden City, 270 App. Div. 936, affd. 296 N.Y. 839; Knickberbocker Ice Co. v. Sprague, 4 F. Supp. 499).

Specifically addressing the six years where the bar had not been used, the court said that alcohol sales could be resumed since the primary non-conforming use of a hotel had not been abandoned:

> We are also of the opinion that there was not an abandonment due to the voluntary termination of liquor sales during the years of 1957-1963. It has been held that, where a zoning ordinance provides for the termination of a nonconforming use after discontinuance for a reasonable specified period, the elements of abandonment of the use

need not be established (Matter of Franmor Realty Corp. v. Le Boeuf, 279 App. Div. 795, mot. for lv. to app. den. 279 App. Div. 874). However, in Franmor the entire use had been discontinued while here the principal use was never discontinued. For these reasons the resumption of liquor sales in 1964 was not an extension of the nonconforming use (Matter of Crossroads Recreation v. Broz, 4 N.Y.2d 39; New York Trap Rock Corp. v. Town of Clarkstown, 3 N.Y.2d 844, affg. 1 A.D.2d 890; Turetsky v. City of Long Beach, 19 A.D.2d 902).

The same situation exists here. The primary non-conforming use, the Country Store, like the hotel in Gauthier, has never been abandoned. Therefore, there is no obstacle to reassuming the lawnmower sales and service intensification.

Respondent's remaining points are dealt with in Petitioner's Memorandum.

2. IT IS INCONCEIVABLE THAT COMMISSIONER HAINES MEANT TO LIMIT THE REPAIR OF LAWMOWERS TO THOSE LAWN MOWERS PREVIOUSLY PURCHASED ON THE SITE

There is probably nothing more practical and down to earth than zoning. Zoning uses are not abstract legal concepts, but real activities that take place in a neighborhood. Dold's existed for 15 years, repairing—without dispute—all lawn mowers brought in for repair, whether purchased on the site or not. Then a lease was proposed, and Commissioner Haines was asked to issue a ruling defining the permissible uses on the site. He was asked to approve lawn mower sales and service. He granted the application. Judge Jung appeared and supported the request. She said then and she says now that she had no problem with Dold's operation, which included the service of lawn mowers no matter where purchased. According to everyone who attended the hearing, the issue of where the

lawnmowers were purchased never came up. Commissioner Haines issued an order unequivocally granting the application for "lawn mower sales and service".

In the course of the opinion, Commissioner Haines remarked, in describing Dold's existing use,

> "The service of lawn mowers is only for products sold on site".

Ms. Jung insists that this language means:

> "The service of lawn mowers is only for lawn mowers previously purchased on the site".

But of course the Opinion does not say this. It refers to the service of products sold on site. Lawnmowers are sold on site, lawnmowers may be repaired. But there is no requirement that the particular lawn mower repaired must have been previously purchased on the site.

Ms. Jung says that the purpose of the Haines Opinion was to prohibit the service of lawn mowers of the general public. Why in the world would Commissioner Haines have done this? When Dold's serviced the lawnmowers of the general public and all the neighbors—including Ms. Jung—supported the application for recognition of the right to sell and service lawn mowers? This analysis just doesn't hold together. Out of the thin air, apparently, without any reason at all, Commissioner Haines came up with a plainly ridiculous restriction,—a neighborhood lawn mower repair service which could only service lawnmowers previously purchased on site.

There is no reason to depart from the general rule that the terms of a decision are found in the order, not in the opinion accompanying it. It is a plainly ridiculous result,—that Mr. Dold or Mr. Hammond or whoever would have to inquire into the chain of title of the lawn mower before repairing it. The more logical interpretation is that submitted by Petitioner: that the opinion limits service to the type of products sold on site. This interpretation harmonizes both phrases regarding sales and service and no words from the opinion or order need be omitted.

3. PETITIONER HAS A VALID EQUITABLE ESTOPPEL CLAIM

At the end of her discussion on estoppel, Ms. Jung remarks (Respondant's Brief at p. 13),

"It is true that Mr. Hammond has been put in an untenable position". Exactly, and this is precisely what the law of estoppel is intended to alleviate.

The law in Maryland on equitable estoppel is stated in Permanent Fin.Corp. v.Montgomery County, 308 Md. 239, 250 (1986): that estoppel exists where the administrative official makes an erroneous and debatable interpretation of the ordinance and the owner in good faith relies thereon. In that case, the interpretation of the County had been such as to allow the building to be 43' high; but the Board of Appeals found this interpretation incorrect, and ruled that the correct height was 35'. Permanent followed the estoppel rule since the interpretation was open to at least "two reasonable interpretations".

The exact same situation exists here. Moxley apparently originally believed the lawn mower sales and service was allowed, because that is what he advised Mr. Hammond. He was apparently following the terms of the order. As was pointed out below, the practice to follow the terms of the order is so well followed in Baltimore County that the text of all the prior orders in a case is required to be stated on the zoning plat. Several years later, Moxley then changed his interpretation, holding that the terms of the opinion governed, not the order.

Whichever is correct, it is impossible to say that the original interpretation was plainly wrong. The rule that a permit that was plainly invalidly issued gives no estoppel is obviously based on the principle that everyone is assumed to know the law is and to follow it. This is the basis for many of the cases cited by Ms. Jung, like Inlet Associates v. Assateague House Condominium Association, 313 Md. 413 (1988), where the City charter said that the conveyance of a street required an ordinance.

But these cases do not apply where the requirement is ambiguous and subject to different interpretations. Here the rule, as established by Permanent, is that the citizen can raise estoppel since if the requirement was so ambiguous that even the governmental body selected an incorrect interpretation, the citizen should not be penalized for following the government's interpretation. The theory is that it is unfair to charge the citizen with "knowing the law" when the law is ambiguous and the governmental body has selected one interpretation. Consider the case of Mr. Hammond here. If he looked at the order, all he could see was that

lawn mower sales and service was allowed. The County gave him a written assurance that everything was o.k. How in the world can Mr. Hammond have been expected to do anything else?

Ms. Jung's point seems to be that the County's position here cannot be considered "egregious" and compares Mr. Hammond's case with Permanent where the developer "spent $2,000,000.00 and the building was completed before they issued the stop work order". Mr. Hammond is not a millionaire developer but a small businessman-blue collar mechanic who purchased the property for $250,000.00, completely renovated two buildings, and was all set to open when the neighborhood raised the zoning issue. The entire Country Store is now closed and sits vacant. Mr. Hammond faces financial disaster.

The special facts of this case, unlike any of the cases cited by Ms. Jung, are not that a clerk made a mistake in issuing a permit, but that Mr. Hammond followed a definite County procedure to get assurance about the permitted zoning, which now turns out to have been wrong. What is the point of the assurance if the citizen cannot rely on it? To repeat Ms. Jung's words,

"Mr. Hammond has been put in an untenable position".

CONCLUSION

Mr. Hammond requests a ruling that he be allowed to conduct the sale and service of lawnmowers and other equipment without the limitation that it is for mowers and other equipment originally sold on site. He requests the exact same use, which existed on the site for 15 years.

Respectfully submitted,

John C. Murphy
John Cannan
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 8th day of March, 2004, I mailed a copy of the foregoing Reply to Ms. Barbara Jung, 11939 Falls Road, Cockeysville, Md. 21030 – 1606 and the Baltimore County Board of Appeals 400 Washington Avenue, Room 49, Towson, Md. 21204.

John C. Murphy

Hammond Reply.doc

New York Appellate Division Reports

GAUTHIER *v.* VIL. OF LARCHMONT, *30 A.D.2d 303* [2d Dept 1968]

291 N.Y.S.2d 584

THOMAS GAUTHIER et al., Respondents, *v.* VILLAGE OF LARCHMONT, Appellant; NEW YORK STATE LIQUOR AUTHORITY et al., Respondents.

Appellate Division of the Supreme Court of the State of New York

Second Department

July 8, 1968.

Appeal from the Supreme Court, Westchester County, JOSEPH F. HAWKINS, J.

Rathkopf & Rathkopf (*Arden H. Rathkopf* of counsel), for appellant.
Page 304

King, Edwards & O'Connor (*Eugene J. McGuinness* of counsel), for Thomas Gauthier and another, respondents.

Louis J. Lefkowitz, Attorney-General (*Philip Weinberg* and *Samuel A. Hirshowitz* of counsel), for New York State Liquor Authority and another, respondents.

BRENNAN, J.

The appellant village by way of its counterclaim sought a judgment declaring that the plaintiffs have no vested right to use their premises as a hotel or restaurant or to maintain a bar therein and enjoining such use. The State Liquor Authority and the Westchester County Alcoholic Beverage Control Board were made parties defendant by the village's supplemental summons pursuant to sections 42 Alco. Bev. Cont. and 124 Alco. Bev. Cont. of the Alcoholic Beverage Control Law.

The record discloses that the subject premises are encumbered by restrictive covenants dating back to 1876. The covenants run with the land and the plaintiffs took the property expressly subject to them. The restrictions provide in part that the premises shall not be used as a "bar room, lager beer saloon, restaurant, ale house, liquor saloon * * * or establishment for any business whatsoever". Despite the restrictions, the premises have been operated continuously as a hotel for over 80 years and a portion thereof had been used as a bar prior to 1919. From 1919 to 1933, although the hotel remained in operation, the bar was closed because of the National Prohibition Act. However, the equipment therein remained intact and that portion of the hotel was used for storage.

In 1921 the village enacted its first zoning ordinance, which provided in part that no building in the area "shall be used * * * as * * * [a] hotel". In 1933 the bar portion of the hotel

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BOARD OF APPEALS

PETITION OF JAMES G. HAMMOND	*	**IN THE**
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	*	**CIRCUIT COURT**
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	**FOR**
	*	
	*	**BALTIMORE COUNTY**
	*	
IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND CASE NUMBER: 03-366 SPH	*	**CASE NUMBER: 03-C-03-12458**
	*	
	*	

* *

RESPONDENT'S MEMORANDUM

Now comes Barbara R. Jung, pro se, and submits the following Memorandum pursuant to Rule 7-207.

STATEMENT OF FACTS

The Respondent agrees that the Ridge Store has operated on the site on Falls Road for a long period of time prior to the introduction of zoning in Baltimore County. Robert Dold did operate a lawn mower repair shop in the rear of the property from 1972 until 1987. (Transcript pg. 78 line 19) When Dennis Peddy wished to lease the property from the Dold's, Mr. Dold requested a Hearing before Mr. Haines, the Baltimore County Zoning Commissioner, to clarify the permissible uses. The request was without opposition because the neighbors, myself included , had seen Mr. Dold's operation and it did not interfere with the residential surroundings. Mr. Dold ceased operation of the lawn mower repairs in 1987. The rear of the property was subsequently uses as a Christmas gift shop and an antique shop but was never again used for mower repairs. (Transcript pg. 82 line 5-7) When Kim Detrick moved into her home in 1992 (transcript pg. 116 line 16) and Ken Sadofsky moved into his home in 1997 (transcript pg. 123 line 1-3), the rear of the property was used as an antique shop.

In 2001, when Mr. Hammond was considering purchasing the property, he asked for and received an opinion from the County as to the permissible use. He also admits that in April of 2001, he received a copy of Zoning Commissioner Haines' 1989 decision. (Transcript pg. 31 line2-3) In his letter to Zoning Commissioner Jablon, he wanted to "clarify and re-establish the non conforming use". (transcript pg. 30 line 10-12) None of this was not known to any of the neighbors.

As the Board of Appeals pointed out in the November 5, 2003 Rehearing, if Mr. Hammond had requested a Special Hearing to establish a permissible use, as Mr. Dold had done, it would have been advertised and in a public hearing, the neighbors would have had the opportunity to be heard.

While Mr. Hammond was working on the property, Mr. Sadofsky and I, on separate occasions, approached Mr. Hammond and expressed concerns about the condition of the property. (Transcript p.106 line21, pg. 107 line 1-12, pg. 59 line 16-21, pg.60 line1-3, pg. 120 line 17-21 and pg. 125 line 1-14). The conditions, as testified to were large commercial trucks being stored on the lot adjacent to Falls Road, piles of junk on the lot and storage of many automobiles on the lot. (Deputy Commissioner Kotroco's Opinion and Order on page 3, Petitioner's Exhibit # 5).

Mr. Hammond's response to me was that he could do whatever he wanted on the property, including having a trucking facility. (Transcript page see above). His response to Mr. Sadofsky was that he could do whatever he wanted, including an automotive repair facility. (Transcript page see above). The Baltimore County Zoning authorities then cited him and he requested the Special Hearing which was held before Deputy Zoning Commissioner Timothy Kotroco in March of 2003.

Mr. Hammond and his attorney attended a meeting with the Falls Road Community Association and told the Board members that he intended to do repairs Monday through Saturday from 7:00 a.m. until 6:00 p.m.(Transcript page 55 line 7-12) He testified, before Deputy Zoning Commissioner, that he keeps a forklift on the property to unload equipment (Transcript pg. 55 line 17-20) and that he keeps a front-end loader on the property to clean up and tow equipment. (transcript pg. 56 line 2-4) He testified that he wants to keep a trailer on the property to haul five or six mowers at once. (Transcript pg. 56 line 7-11)

Mr. Hammond admitted that in the fall/winter of 2002-2003, he had a commercial tree trimming truck parked on the lot adjacent to Falls Road for a period of a month, while he repaired it. (Transcript pg. 57 line 17-21 and pg. 58 line 1-15) He admitted that he did repairs on commercial equipment over that same period of time (transcript pg. 58 line 16-21 and pg. 59 line 1-3) He told Deputy Commissioner Kotroko that he intends to service engine up to 100 horsepower (transcript pg. 61 line 6-9) and acknowledged that Mr. Dold testified that he worked on engine of only 20 horsepower. (Transcript pg. 61 line 10-12) He admitted storing automobiles and a tractor on the property. (Transcript pg. 65 line 15-20)

After Mr. Hammond was cited by the Zoning Authorities, in an effort to resolve the issues, Kim Detrick and I met with Mr. Hammond and Mr. Murphy. (Transcript pg 48 line 4-21, pg. 49, 50 and pg. 51 line 1-10).

However no agreement could be reached because of the noise issue. (Transcript pg. 106 line 4-9, line 13-18, pg 108 line 3-8 and pg. 117 line 10-14)

Deputy Commissioner Kotroco, on April 11, 2003, denied Mr. Hammond's request to service mowers not sold by him on the property. (Petitioner's Exhibit #5). The Board of Appeals, on October 17, 2003, found that the use of the lawn mower repair shop had been abandoned pursuant to Baltimore County Code Section 104.1 and that they would not consider the estoppel argument. (Petitioner's Exhibit #6). The Board of Appeals held that "we read this decision in conjunction with Landay and reject Petitioner's contention that, even though no lawn mower repair were done on the subject property for the past 15 years, the continued non conforming existence of the country store carries with it the right to essentially reinstate the non conforming use of sales and repair of lawnmowers at this time." (Petitioner's Exhibit 6 pg. 4). The Board found that under Section 104.1, that the use no longer exists. The Board of Appeals then again denied the Petitioner's Request for Rehearing on November 5, 2003 stating that there had been no evidence of fraud, irregularity or mistake. (Respondent's Exhibit # 1).

QUESTION NUMBER 1

HAS THE USE AS A LAWN MOWER REPAIR SHOP BEEN ABANDONED OR CHANGED?

Mr. Hammond argues that the use has not been abandoned because the use as a lawn mower repair shop is simply an intensification of the original non conforming use as a general store. The Board of Appeals found that "the owners of the subject site did indeed allow the non conforming use of lawn mower sales and repairs to be abandoned for a period exceeding one year; and that pursuant to **Baltimore County Zoning Regulations Section 104.1**, the permission to carry on those activities at the subject site no longer exists". (Petitioner's Exhibit # 6 at page 4).

The evidence is uncontradicted that lawn mower sales and repairs ceased in 1987 . Since then, the rear building has been used as an antique shop, a Christmas shop and been left empty for a long period of time. Neighbors have moved into nearby homes, never foreseeing the possibility of living adjacent to a lawn mower shop.

Mr. Hammond's argument, taken to it's logical conclusion is that a property owner, who has a lawful nonconforming use can intensify that use, let the intensified use lapse for 15 years change the use and restart the original use at will. This theory leaves the neighborhood surrounding the property subject to the whim of the property owner.

The Court of Appeals has held that nonconforming uses are not favored and the Zoning Authorities of each county have the right to limit the ability of the property owner to change, expand, alter or recommence after the cessation of a non conforming use. **County Council of Prince George's County, Maryland v. E. L. Gardner Inc. 293 Md. 259.**

Baltimore County Zoning Regulation 104.1 states that "if the property owner *changes* the use in any way or abandons operations for one year, the nonconforming use **SHALL** terminate. The Court of Appeals in **Albert Landau v. Board of Zoning Appeals, et al 173 Md. 460** held that the definition of existing use should mean "the utilization of the premises so that they be known in the neighborhood as being employed for a given purpose i.e. the conduct of a business" The purpose of the "known in the neighborhood" test is so people who move into the neighborhood are on notice that they are moving near a business in a residentially zoned neighborhood. It is simple fairness. During the 15 or so years that the mower shop was not in existence, people have purchased homes in the area with no inkling that this shop could operate.

Judge Moylan in **Fotoryan v. Mayor and City Council for Baltimore City 150 Md.App. 157** discusses what constitutes change of use in the context of zoning statutes. In **Fotoryan,** the original nonconforming use was a gas station with auto repairs as an auxiliary use. The gas pumps were removed and the primary use became auto repairs. Many neighbors testified that the change produced more traffic and noise as well as an unsightly condition. Judge Moylan held that these facts were sufficient to support a finding that the use had changed significantly enough to be barred by the applicable Zoning statutes. In this case, the change is from a Christmas or antique shop to mower repairs. How can this be argued not to be sufficient enough to qualify as a change in use pursuant to Baltimore County Zoning Regulation 104.1?

Zoning Commissioner Haines, in SPH 89-204 did find that the use as a lawn mower sales and repair shop was an intensification of the nonconforming use as a general store.(Plaintiff Exhibit #2). That was done pursuant to a public hearing without opposition from the neighborhood. For many years prior to that hearing Robert Dold had operated a mower repair. The neighbors had seen how he operated the business. Mr. Hammond, in contrast, asked for and received an answer from the County without notice to the public and without a chance for the neighbors to be heard. As pointed out by the Board of Appeals members, in the Hearing to Reconsider, he could have requested a public hearing, prior to the purchase of the property, to clarify the permissible use of the property. He then would have known of the opposition before purchasing the property.

The Court of Special Appeals in **Leon McKemy v. Baltimore County et al 39 Md. Ap. 257** formulated a four prong test to determine whether a change in use is an intensification or enlargement of the use. The third prong is whether the proposed use has a substantially different effect on the community. Mr. Hammond's proposes to do repairs from 7:oo a.m. until 6:00 p.m. Monday through Saturday. He intends to store mowers for sale on the open lot adjacent to Falls Road. The neighbors have gotten a taste of how he proposes to conduct his business. His response, when confronted with the neighbor's concerns was that he could do whatever he wanted on the property. This certainly has a substantially different effect on the neighborhood.

Mr. Murphy argues that the holding of the Vermont Court in **Appeal of Gregoire** 742 A.2d 1232 (1999) in not applicable. It is obviously not binding, but it is certainly persuasive. A full reading of the case indicates that the Vermont statutes and case law on non-conforming uses and change in uses or abandonment are very similar to Maryland's. In the Vermont case, there were 6 camps on a lot. It was a legal non-conforming use because it pre-dated zoning laws. Although four of the buildings were continually used over the years without interruption, two of the other buildings, Camp Mike and The Birches, were not used for a period of time sufficient to meet the Vermont standard of abandonment.

The Court held that one piece of property can have multiple non-conforming uses and one and not the other may be abandoned. The Court therefore held that Camp Mike and The Birches had been abandoned and could not be revived. Even if the Board is convinced that the lawn mower repair was not a non-conforming use but intensification, the reason for the abandonment or change in use statutes remain the same. If a landowner stops using a property for a specific use or changes the use, under the statutes in both Vermont and Maryland, the use ceases to exist.

Whether the proposed mower shop is an intensification then becomes a moot point. It is a use that has not existed for approximately 15 years and has been abandoned. Baltimore County Zoning Regulations 104.1 says that if the" owner **changes** the use in any way **or abandons** operations for one year, the non conforming use shall terminate. Under any theory of statutory interpretation, the meaning is clear. If you change the use or abandon the use for a year, the right to the non conforming use is terminated. The property has not been used for mower repairs since 1987 and more importantly, the use has been changed to a less intrusive use. It has either been empty, a seasonal Christmas shop or an antique shop. However, a review of the law in Maryland on nonconforming uses cannot lead to any conclusion other then it is not fair to adjacent neighbors to allow the use as a mower repair shop after a period of 15 years.

QUESTION NUMBER 2

DOES MR. HAMMOND HAVE THE RIGHT TO SERVICE MOWERS HE HAS NOT SOLD?

After Mr. Hammond purchased the property, he was cited by the Zoning Authorities for violating Commissioner Haines' decision in SPH 89-204. The testimony is clear that Robert Dold operated a lawn mower repair shop on the property from 1972-1987. When Dennis Peddy was interested in renting the property, he requested a Special Hearing to clarify the permissible uses. The neighbors, myself included, appeared at the hearing in support of the Dolds. Mr. Haines, in the body of the opinion states " there are no off site contractors or construction companies using the site, nor are any landscaping or trucking operation being undertaken. There is no automotive service garage and none will be permitted on site. **The service of lawn mowers is only for products sold on site**"

Mr. Haines was attempting to very clearly delineate what could and could not be done on the property. The above language is clearly an attempt to limit the size of the operation so that it will not interfere with the residential neighborhood.. No appeal was taken from that Opinion and Order. Do we all wish he had put that language in his Order? Of course we do. Mr. Hammond admitted that prior to purchasing the property, he had read a copy of that opinion. The language could not be more straightforward. If there was any question in his mind about that, he could have questioned Mr. Moxley or requested a Special Hearing. He did neither. When Mr. Moxley told Mr. Hammond that gasoline sales were not allowed, Mr. Hammond questioned that and it was clarified.

Should this Court find that the use was not abandoned, the language of Mr. Haines' Opinion is clear that Mr. Hammond can service only those mowers which he sells, not the mowers of the general public.

QUESTION NUMBER 3

SHOULD BALTIMORE COUNTY BE ESTOPPED FROM ENFORCING THE ZONING REGULATION BASED ON THE ADVICE OF BALTIMORE COUNTY ZONING AUTHORITIES?

Mr. Murphy cites the cases of **Prince George's County v. Sunrise Development Limited Partnership, Town of Sykesville v. West Shore and Pemburton v. Montgomery County** for the proposition that the defense of estoppel is available to Mr. Hammond. These cases are not estoppel cases, they are vested rights cases.

The law of vested rights applies only to situations where a property owner is issued a permit by the County and in good faith reliance on that permit begins substantial construction that is visible to the public. The property owner obtains a vested right in continuing construction even when the County subsequently changes the zoning classification on the subject property. The Court of Special Appeals, in **Relay v. Sycamore**, 105 Md. Ap. 701 at page 725 held that in order to avail oneself of the defense of vested rights, using the strict Maryland rule, that "a landowner may rely on nothing other than a properly issued permit".

Mr. Murphy states that **The Town of Sykesville et al v. West Shore Communications Inc. et al**, 119 Md. Ap. 300 (1996) case holds that the government was estopped from preventing West Shore's use of the property. Although Judge Moylan discusses the differences between the law of vested rights and zoning estoppel, the holding of the case is that West Shore Communications had a vested right in continued construction based on the issuance of a valid permit and the fact that they had completed substantial construction prior to the change in zoning

The holding of the Court of Appeals in **Prince Georges County v. Sunrise Development Ltd. Partnership**, 330 Md. 297 (1993) is that because Sunrise had poured a single 2' by 2' footing in the middle of it's 10 acre lot pursuant to a valid permit, there was not sufficient construction viewable by the public to support a claim of vested rights.

The Court of Appeals, in **Pemberton v. Montgomery County, Maryland et al.** 275 Md. 363 (1975) held that Pemberton had a vested right in continued construction because construction was begun pursuant to a valid permit. This is also a vested right case, not an estoppel case.

The factual situation of Mr. Hammond's case is not appropriate for a vested rights argument based on the fact that Mr. Hammond did not rely on a county issued permit, but on the advice of Mr. Moxley as to a permitted use. Further, there was no rezoning which is required in a vested right case

If there is any recourse available to Mr. Hammond, it is estoppel. However, Mr. Hammond cannot rely on the theory of estoppel because the law in Maryland is clear that estoppel can be used only when the County acts in bad faith or in an extremely egregious manner.

The general rule of estoppel ,when applied to zoning cases in Maryland , is that "the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances because of an error or mistake committed by one of it's officers or agents which has been relied on by a third party to his detriment." **Lipsitz v. Parr** 164 Md. 222 (1933).

The Court of Appeals has not allowed the defense of zoning estoppel when County officials made a mistake by advising the developer that it could convey a right of way by passage of an ordinance as opposed to a resolution (**Inlet Associates v. Assateague House Condominium Association et al,** 313 Md. 413 (1988). The Court of Appeals refused to allow the defense of vested rights or estoppel in a situation where a County official advised a developer that he need not apply for a building permit for his project. That advice was put in writing and in reliance on that the project was built. (**The City of Hagerstown et al v. Long Meadow Shopping Center et al,** 264 Md. 481 (1972).

The Court of Appeals has allowed the defense of estoppel in a situation where a permit was issued for a building that was subsequently found to violate the County's height restriction. The decision to issue the permit was based on an interpretation of the height restriction statute and was consistent with the County's practice in similar cases. The County waited eight and one half months, after Permanent Financial had spent more then $2,000,000.00 and the building was completed before they issued the stop work order. The issue was whether the height of the building, which was 43 feet, was permissible under the statute. The Court found that Montgomery County had consistently allowed a building to be 43 feet tall. Because the issue was what was the definition of uninhabitable space and the County had consistently interpreted it in such a way that a 43 foot building was permissible, the Court held that the County should be estopped from using a definition that would make the building illegal.

The Court held that since the issuance of the permit was not the result of an oversight or a mistake, but was consistent with the County's practice and interpretation of the height restriction statute, that it would be inequitable to enforce the height restriction. (**Permanent Financial Corporation v. Montgomery County, Maryland et al,** 308 Md. 239 (1986).

The Court of Special Appeals allowed the builder to assert the defense of estoppel in a case where the County refused to issue a sewer permit. The Court found that since there was a previous Court order directing the County to issue a permit and the County, in violation of that court order refused to do so, that the County had acted in an arbitrary, capricious and potentially contemptuous manner The Court found that such action was intended to stall until the County rezoned the property that made it impossible for the developer to build. The Court held "that especially egregious actions of public officials in stalling the issuance of permits in order to eliminate development by downsizing may create a zoning estoppel as to particular properties". (**J. Allan Offen v. County Council for Prince George's County**, 96 Md. Ap. 526 (1993). The Court of Special Appeals remanded the case to the Circuit Court for a factual determination of whether the County had acted in an egregious manner. The Court of Appeals reversed the order for Remand because the issue of estoppel had not been raised or argued by the parties, therefore it should not have been considered by the Court of Special Appeals. The Court further found that zoning estoppel had not yet been recognized in Maryland. **(County Council of Prince Georges County, Md. V. J. Allen Offen,** 334 Md. 499 (1994).

The Court of Appeals, in **Marzullo v. Kahl**, 366 Md. 158, (2001) discussed vested rights and equitable estoppel. This case involved a Baltimore County land owner (Kahl) who raised boa constrictors and pythons on his residentially zoned property. He subsequently applied for and was granted a license and a building permit for a Wildlife Holding Facility. Subsequently, the landowner's neighbor (Marzullo) filed a request for a Special Hearing to determine whether Mr. Kahl could continue. After a long discussion as to what is the definition of a farm, the Court of Appeals addresses equitable estoppel and vested rights. As to whether Mr. Kahl had established a vested right, the Court held that although he had obtained a permit and started construction, he did not meet the first prong of the vested right test i.e. that the permit was lawful when issued but became unlawful. Generally, in the absence of bad faith on the part of the remitting official, applicants for permits involving interpretations accept the afforded interpretation at their risk." The Court found no bad faith in the decision by the County to issue the permit. The County official made a mistake believing that Mr. Kahl's property qualified as a farm. Therefore the defense of vested rights was not available to Mr. Kahl.

As to the equitable estoppel argument, the Court in **Marzullo** reiterated the general rule as stated in **Inlet Associates v. Assateague House Condominium Associates,** 313 Md. 413, and **Permanent Fin. Corp. v. Montgomery County**, 308 Md. 239. The general rule is that "the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances, because of an error or mistake committed by one of it's officers or agents which has been relied on by the third party to his detriment." The Court reasoned that because the building permit issued to Mr. Kahl was in violation of the Zoning laws from the beginning, the doctrine of equitable estoppel couldn't be used.

The Court of Special Appeals, in **United Parcel Service, Inc. v. People's Council for Baltimore County,** 93 Md. Ap. 59 (1992) reversed on procedural grounds **United Parcel Services, Inc. and Baltimore County, Maryland v. People's Counsel for Baltimore County, Maryland,** 336 Md. 569 (1994) held that advice given to U.P.S. by the Zoning Commissioner Arnold Jablon as to what was a permitted use could not turn a non-permitted use into a permitted use. U.P.S. approached Mr. Jablon requesting his opinion as to whether their proposed use was lawful. At a meeting, Mr. Jablon told them it was a permitted use. U.P.S. sent Mr. Jablon a letter confirming his opinion and Mr. Jablon returned the letter to U.P.S. with a note that read "the aforementioned use of this property zoned ML is one that is permitted and is o.k." U.P.S. purchased the property and began building. A neighbor objected and wrote a letter to Mr. Jablon who reiterated that the proposed use was lawful. That decision was appealed to the Board of Appeals. The Court of Appeals subsequently found this was not an appeasable order. However, the Circuit Court for Baltimore County found that the proposed use was not lawful and that the mistaken advice given by Mr. Jablon could not transform a non-permitted use into a permitted use. Therefore United Parcel Services could not argue that the County was estopped from enforcing the applicable zoning regulations. The Court of Special Appeals affirmed this finding.

The Court of Special Appeals again discussed vested rights and zoning estoppel in the case of **Relay v. Sycamore** 105 Md. Ap. 701 at pg. 716 (1995). Judge Davis found that "administrative negligence" is not enough to support a claim of zoning estoppel.
The Court of Special Appeals held that the County's action, although it may show negligent delay, is not enough to support a claim of zoning estoppel. The Court held that "a zoning estoppel may not be found unless (1) the local government acts, or fails to act, in an arbitrary and unreasonable manner, (2) with deliberate intent to delay construction, and (3) the conduct at issue is the proximate cause...". Judge Davis continues " with regard to the first two elements, the fact finder must conclude that the act or omission of government officials were deliberately calculated to deny the property owner his right to use the land in a currently legal manner".

The Court of Appeals in **Sycamore Realty Co. Inc. v. People's Counsel for Baltimore County** 344 Md. 57 (1996) held that because Sycamore had not obtained a permit or begun construction, there was no vested right once the zoning classification was changed. The Court further held that estoppel should not have been considered.

The Maryland Courts have been reluctant to recognize estoppel in the area of zoning. The law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the county official, zoning estoppel does not apply. Administrative negligence is not enough; mistakes and errors by county officials are not enough. The Court has recognized the defense of estoppel in a case where the county official, ignoring a Court order, refused to issue a sewer permit.(**J. Allan Offen v. County Council for Prince George's County supra**). In **Permenent Financial**, the Court found that since there were two interpretations of the height restriction and the County used the interpretation it had used before and after that permit was granted, estoppel applies.

In the present case, Mr. Hammond wrote a letter to Baltimore County asking whether he could **re-establish** a lawn mower repair business on the property. Mr. Hammond admits in his letter that the non conforming use as a lawn mower repair shop has been abandoned or changed by using the word re-establish. Mr. Moxley responded, in Exhibit #1, that "current uses on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case # 89-204SPH. Specifically, the Commissioner approved the following non-conforming use on said property, country store...and lawn mower repair and service...". Mr. Moxley was obviously wrong in that the use as a lawn mower repair shop had not been in existence for 15 years and therefore was illegal under **Baltimore County Zoning Regulation Section 104.1.** He made the further mistake that gasoline sales were not included and when questioned by Mr. Hammond, he amended that part of that part of his opinion. Mr. Hammond should certainly been on notice that Mr. Moxley was not infallible. As the case law in Maryland makes clear, Mr. Hammond relied on that advice at his own peril. He could have requested a hearing by the Zoning Commissioner prior to purchasing the property pursuant to **Baltimore County Zoning Regulation 550.7** to clarify the permissible use of the property. He could have consulted an attorney. He could have read the Opinion and seen the restrictions himself.

The facts in this case do not support a finding that Mr. Moxley acted in an arbitrary, egregious or capricious manner. He is a non-lawyer who made a mistake. He did not give an opinion based on a long standing and reasonable interpretation of the applicable statute. Mr. Haines opinion could not have been more clear when he stated certain uses that were not permissible and stated "the service of lawn mowers is only for products sold on site". (Petitioner Exhibit #2 page 7).

The County subsequently cited Mr. Hammond for doing repairs on mowers not sold on site and Mr. Hammond then requested a Special Hearing before the Zoning Commissioner. Because Mr. Moxley's advice was wrong from the start, the Petitioner cannot claim the County should be estopped from enforcing Mr. Haines' decision. Mr. Moxley, arguably made a mistake and may be guilty of administrative negligence but there is certainly not one shred of evidence that he acted in an unreasonable and arbitrary manner with the deliberate intent to mislead Mr. Hammond. Because of the state of the law in Maryland in regard to estoppel, Mr. Hammond's claim that the County should be prevented from enforcing the Baltimore County Zoning Regulation 104.1 based on Mr. Moxley's letter fails.

Mr. Murphy arues that, under contract law, the County has breached the contract between the County and Mr. Hammond. That may be so, but that has no place in the estoppel argument. It may give Mr. Hammond a cause of action for breach of contract or negligence, however it is irrelevant to an estoppel argument. Mr. Murphy admits in his Memorandum that Mr. Hammond has filed suit against Baltimore County.

It is true that Mr. Hammond has been put in an untenable position. However, the purpose of Zoning Regulations is to protect ALL landowners. In this case, three Protestants came forward in an attempt to protect the value and integrity of their properties. It is not equitable for the surrounding property owners to suffer for many years to come based on Mr. Moxley's error.

Therefore I pray the Circuit Court to affirm the Board of Appeals findings that the use as a lawnmower repair facility has been abandoned or there has been a change is use sufficient to terminate the use and that the County is not estopped from enforcing the Zoning Regulations based on the incorrect advice from Mr. Moxley.

Respectfully Submitted,

Barbara R. Jung

Barbara R. Jung
Pro Se
Respondent
11939 Falls Road
Cockeysville, Md. 21030

I HEREBY CERTIFY, that on this 17 day of February, 2004, I mailed a copy of the foregoing Memorandum to John C. Murphy, Esq., Suite 206, 516 North Charles Street, Baltimore, Maryland 21201 and County Board of Appeals for Baltimore County, 400 Washington Avenue, Room 49, Towson, Maryland 21204.

Barbara R. Jung

IN THE MATTER OF: * BEFORE THE

THE APPLICATION OF * COUNTY BOARD OF APPEALS

JAMES G. HAMMAND - LEGAL OWNER/ * OF

PETITIONER FOR A SPECIAL HEARING * BALTIMORE COUNTY

ON PROPERTY LOCATED ON THE W/SIDE* Case No. 03-366-SPH

OF FALLS ROAD, 2,200' NORTH OF * June 25, 2003

BROADWAY ROAD (11942 and 11950 *

Falls Road) *

8th ELECTION DISTRICT *

3rd 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 25, 2003.

* * * * *

Reported by:

C.E. Peatt

IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- LEGAL OWNER / PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/SIDE OF FALLS ROAD, 2,200' N OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD) 8TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Case No. 03-366-SPH

* * * * * * * * *

RULING ON PETITIONER'S MOTION FOR REHEARING

The Board convened on November 5, 2003 and received argument on the Motion for Rehearing and Supplementary Motion for Rehearing filed by John C. Murphy, Esquire, and the Response thereto filed Barbara Jung, *pro se*.

At the conclusion of oral argument, the Board recessed and then reconvened in public deliberation, at which time the Board, having individually read the submissions offered by both parties, and having heard oral argument, unanimously determined that, in the issuance of its original Opinion and Order, there was not present any fraud, mistake, or irregularity so as to alter its original decision issued by the Board under date of October 17, 2003. Therefore, its original decision is AFFIRMED.

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 M. Stahl, Chairman

Margaret Worrall

Charles L. Marks

DATE: November 6, 2003

1/20/03 (?)
04

PETITION OF JAMES G. HAMMOND FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- CASE No: 03-366-SPH	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY Case No.: 03-C-03-12458

RECEIVED
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BALTIMORE COUNTY
BOARD OF APPEALS

PETITIONER'S MEMORANDUM

James G. Hammond, Petitioner, by his attorney, John C. Murphy, submits the following Memorandum in compliance with Rule 7-207.

STATEMENT OF FACTS

Since 1915, the Ridge Country Store has operated on Falls Road, north of the Beltway. June 25 Hearing Transcript, attached as Exhibit 1, at p. 12 Over the last 88 years, it has housed a number of different activities under the broad aegis of a country store, -- feed sales, groceries, hardware, plant and tree sales, landscaping, gasoline sales, deli, and lawn and garden equipment sales. Haines Decision, attached as Exhibit 2, at pp. 2-3 In 1945, zoning came to Baltimore County and the Ridge Country Store became a non-conforming use, a remnant of the previous agricultural economy in a now residential area, but it continued to operate. Id.

From 1972 to 1989 Dold's Lawn Mower Sales and Service operated at the site, selling new mowers and servicing mowers. Exhibit 1 at p. 12 All the

witnesses at the hearing below – Robert Dold, Robert Homer, William Spreacher and Judge Jung – agreed that in the 17 years that Dold operated the store, it sold lawn mowers and it serviced lawn mowers, and the service of lawn mowers was not limited to mowers previously purchased at the site. Exhibit 1 at p 77, 84-85, 91, 110 In 1989, a Mr. Dennis Peddy was interested in leasing the entire property for flowers, plants and related supplies and he applied to the Zoning Commissioner for the formal establishment of the non-conforming use. Zoning Commissioner J. Robert Haines authorized a non-conforming use for a country store. Exhibit 2 The Haines decision said that the uses had changed over the years but the basic use for a country store remained. Exhibit 2 at p. 6 In regard to the lawn mower sales and service, he said that it was not a change from the non-conforming use, but rather a permissible intensification of the non-conforming country store. "The lawn mower sales and services is a change, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation." Id. In the body of the opinion, the Haines decision noted: "The service of lawn mowers is only for products sold on site". Id. at 7 In the Order, the Haines decision simply approved the sale and service of lawn mowers.

> THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 30th day of November 1988 that the Petition for Special Hearing to approve a nonconforming use for a Country Store, with Food and Grocery sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Land and Garden Supplies and Equipment for sale, not including contractors or

> construction companies, landscaping or trucking operation or an automobile service garage...." Id. at 7-8 (emphasis supplied)

Following the Haines decision, Dold leased the property to Peddy and gave up the lawn mower sales and service. Exhibit 1 at pp. 80-82

In 2001, James Hammond investigated purchasing the Ridge Country Store to re-establish the lawn mower sales and service uses. Exhibit 1 at 29-33 The County has a written procedure whereby upon the payment of a fee of $40.00, a citizen can submit what is called a "Letter of Spirit of Intent", describe the proposed use, and obtain a determination from the Zoning Office whether the proposed use is allowed. Exhibit 1 at pp. 16-17, 29-33 Hammond submitted such a written request to Arnold Jablon, Director of Permits and Development Management for the County, and paid the fee. Id. In the letter, attached as Exhibit 3, Hammond asked specifically:

> "The rear 900 sf building was formerly approved for a lawn mower sales and service operation. Subsequently, the building had been used as a gift shop. I propose to re-establish the lawn mower sales and service operation and continue the additional uses below."

Mr. Hammond received a reply to his letter, signed by Lloyd T. Moxley, a planner with the County's Zoning Review office, attached as Exhibit 4 This letter stated that "lawn mower sales and service" was allowed. So Mr. Hammond went ahead, spent $250,000.00 on the purchase, and worked for a year to repair the place and get it ready for business. Exhibit 1 at pp. 34-36 According to Judge Jung, a neighbor to Mr. Hammond and a respondent in this case, Mr. Hammond "worked like a dog" to get the property in order. Id. at p. 106

Then a community association raised objections, and the County switched gears, taking the position that the repair use could only be for lawn mowers actually purchased at the site, a sharp departure from Dold's use, which had existed for 16 years. Id. at 37-38 Mr. Hammond filed a petition with the Zoning Commissioner, Timothy M. Kotroco, who ruled that the service was indeed limited to mowers purchased at the site. Kotroco Opinion attached as Exhibit 5 Mr. Hammond appealed this decision to the Board of Appeals. Prior to the hearing on the matter by the Board of Appeals, Mr. Hammond and his attorney met with neighbors including Judge Jung, in an effort to reach an agreement to mitigate any impact Mr. Hammond's operations might have on their properties. Id. at pp. 110-112, 199-121

The Board of Appeals ruled that the right to conduct the lawn mower sales and service had been lost entirely since it had ceased after 1989. Board of Appeals Opinion attached as Exhibit 6

Following this ruling, Mr. Hammond could no longer economically maintain the Ridge County Store. He was forced to close it and it now sits vacant. He faces financial disaster.

STANDARD OF REVIEW

This is an administrative appeal. Factual determinations made by the Board of Appeals are governed by the fairly debatable rule. Red Roof Inns, Inc. v. People's Counsel, 96 Md. App. 219, 223-224 (1993). Legal determinations, however, are entitled to no deference but are solely within the prerogative of the

reviewing court. Belvoir Farms Homeowners Association v. North, 355 Md. 259, 267 (1999). ("Generally, a decision of an administrative agency, including a local zoning board, is owed no deference when its conclusions are based upon an error of law.")

In this case, there is essentially no dispute as to the facts. It is believed that all the issues are entirely legal.

II
QUESTIONS PRESENTED

1. Does the Zoning Ordinance prohibit lawn mower sales and service on the site as a lapsed non-nonconforming use?

2. Does the owner have the right to use the property for a lawn mower sales and service business as a result of the Haines decision or as a permissible intensification?

3. Do the facts of this case meet the test for estoppel as set forth by the Court of Appeals in Permanent Fin. Corp. v. Montgomery Cty., 308 Md. 239 (1986)?

III.
ARGUMENT

1. The Non-Conforming Use Is For the Country Store and It Has Not Lapsed.

The Board made a fundamental error when it characterized the lawn mower operation as a non-conforming use and applied the one-year abandonment rule to that use. Exhibit 6 at p. 4 The lawn mower operation was not a non-conforming use. It did not precede the adoption of the zoning in 1945. It only came along in

1972. Exhibit 1 at p. 80 and Exhibit 2 at p. 6 The one- year abandonment rule applies to non-conforming uses, Section 104.1 of the Baltimore County Zoning regulations:

> 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.

The Board reasoned that since the lawn mower sales and service terminated after 1989, it lost its status as a non-conforming use. Exhibit 6 at 3-4 The flaw in this conclusion is that the lawn mower sales and service never was a separate non-conforming use. If it had been a separate use, it would have been prohibited since it did not precede the 1945 zoning. Moreover, upon the change from the general store to the lawn mower sales and service, it would have terminated as well. Note that Section 101.4 speaks of the discontinuance of "such use", or the change of "such use" to any other use whatsoever, the right to the use would terminate. Applying the statute to the facts of this case, "such use" is not the lawn mower sales and service operation but the country store. This exact issue was addressed by Commissioner Haines in 1989. He held the lawn mower sales and service was not a separate use but rather an intensification of the general store use:

> "Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. <u>The lawnmower sales and service is a change, however, it is also a mere intensification of the Farm and/or Feed Store</u> which grew into the

> Lawn and Garden Supply operation." Exhibit 2 at p. 6 (emphasis supplied)

The classification of the lawn mower use as an intensification of the general store use decides this matter. The reason is that Maryland case law is firm that every non-conforming use has a right to a reasonable intensification of that use within the scope of the original non-conforming use. Judge Cathell explored this at great length in County Comm'rs v. Zent, 86 Md. App. 745 (1991) where he held that once recognized as a non-conforming use, a zoning authority had no power to terminate the use or "any proper incidental use of that business". Id. at 750 The other leading case is McKemy v. Baltimore County, 39 Md. App. 257 (1978). In that case, the issue was over whether truck storage was within the ambit of the original non-conforming uses for a restaurant and fuel oil business. Judge Wilner framed the question in this manner, 39 Md. App. at 269:

> "Upon those findings, it was incumbent upon the Board to determine, factually, whether those expanded uses represented a permissible intensification of the original use or an actual change from what the 1969 Board found existed `to any other use whatsoever.'"

Commissioner Haines cited McKemy and followed it when he wrote his 1989 decision, finding that the lawnmower sales and service was a permissible intensification. Exhibit 2 at p. 5

Zent contains a listing of many Maryland cases that approved intensifications of non-conforming uses. They include Kastendike v.Baltimore Ass'n for Retarded Children, Inc. 267 Md. 389 (1972) (change in use of non-

conforming treatment facility upheld); Green v.Garrett, 192 Md. 52, aff'd after remand, 193 Md. 260 (1949) (expansion of use of Memorial Stadium); Parr v. Bradyhouse, 177 Md. 245, (1939) (expansion of use from a dairy business to a riding academy); Feldstein v. LaVale Zoning Bd., 246 Md. 204 (1967) (expansion in frequency of junkyard; Jahnigen v.Staley, 245 Md. 130 (1967) (more boats at boat rental facility permissible intensification, additional pier not permissible).

In short, it is fundamental Maryland law that the owner of a non-conforming use has a right to intensify that use within the parameters of the original use. As a practical matter, it is easy to see why Commissioner Haines ruled that lawn mower sales and service was within the scope of a general store, which sold hardware and other similar items. In the case before us, it is likely that back in 1915 when the original General Store was established, that power lawn mowers were unknown. But it was and is a conclusion of common sense that the sale and repair of mowers is a reasonable activity to be conducted by a general store, which sells hardware and other lawn care items. Picture in your mind the array of power mowers grouped out in front of Ayd's and the other hardware stores in Baltimore County as the spring mowing season approaches. The uses associated with a general store can come and go over the years as conditions change. But as long as the original non-conforming use remains, the right to conduct – or not to conduct – uses associated with the non-conforming use remains.

If the cessation of the intensification of the non-conforming use results in the loss of that use even though as here the non-conforming use remains, then the non-conforming use has lost its ability to intensify even though the use continues unabated. This is totally inconsistent with the fundamental doctrine as expressed in Zent and McKemy, supra, that a non conforming use has a right to intensify. There is nothing in that doctrine that says that one can only intensify once, and that once the intensification is started, it has to continue.

The consequences of the rule followed by the Board would be absurd. For example, it might be a permissible intensification of the general store to repair screens. As long as that use is not undertaken, the right to do it continues. But once its started, it would be lost forever if it ever ceased. This is an absurd result.

The fundamental difference between the continuation of the non-conforming use and the continuation of an intensification of a non-conforming use is that the statute addresses the former and says it ceases if discontinued or changed. The established Maryland case law, on the other hand, McKemy and Zent, supra, expressly recognize the right to intensify a non-conforming use.

The Vermont case on which the Board relied, Appeal of Gregoire, 170 Vt. 556, 742 A.2d 1232 (1999), is not on point since the use which terminated was a non-conforming use which predated the zoning. This case involved the non-conforming status of a number of camps on a single piece of property. All the camps had been constructed before the effective date of the zoning: "...the camps

at issue were constructed and occupied prior to the enactment of any Colchester zoning regulations....". 170 Vt. at 557.

However, two of the camps had ceased before the adoption of the zoning. The crux of the Court's ruling is that " a single location can be the source of multiple non-conforming uses". 170 Vt. at 560 Commissioner Haines emphatically did not find that the lawn mower business was a separate non-conforming use; this would have been impossible since it did not precede the adoption of zoning in 1945. Instead, Commissioner Haines found that the non-conforming use was the general store, which continues to this day. Exhibit 2 at p. 6 This is in contrast to the situation in Gregoire where the non-conforming use for the cabins in question had ceased.

Judge Jung argued below, and the Board apparently accepted the argument, that the lawn mower sales and service was a separate non-conforming use and not an intensification of a non conforming use. She said in her "Response to [Petitioner's] Request for Rehearing,"

> The Petitioner made the argument about whether the repair shop was an intensification of the country store. The Board was not persuaded by that argument. The Board, in its opinion, found that the lawn mower repair business was a separate non-conforming use that had been abandoned". (emphasis supplied)

It appears that that is exactly what the Board did find,--that the lawn mower sales and service was a separate non-conforming use that had been abandoned. Exhibit 6 at p. 4 But the Board was wrong because the lawn mower use could not have been a separate non-conforming use since it was only established in 1972.

Moreover, it is directly inconsistent with the Haines opinion, which was never appealed and is binding upon subsequent proceedings. White v. Prince George's County, 282 Md. 641, 658 (1978) ("principles of public policy underlying the rule of res judicata [are] applicable to . . . administrative agencies performing quasi judicial functions")

2. The Right to Conduct Lawn Mower Sales and Service Exists As a Result of the Haines Decision and As a Permissible Intensification

The persons opposing this use have taken the position that the Haines opinion means that the service of lawn mowers is limited to lawn mowers actually purchased on the site. The Board made a similar conclusion,

> In his Opinion (as opposed to the Order which accompanied the Opinion), he limited repair services only to those machines actually sold on the site. Exhibit 6 at pp. 1-2

The Board made a fundamental misinterpretation of the Haines language, going beyond the actual language of the opinion. The entire paragraph reads as follows:

> There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site. Exhibit 2 at p. 7 (emphasis supplied)

The sentence by its terms doesn't limit anything, contrary to what the Board said. It describes Dold's existing use. Nor does it limit repairs to "those machines actually sold on the site". What it does say, quite literally, is that the service of lawn mowers is for products sold on site. It describes Dold's existing

operation quite accurately. Dold's sold lawn mowers. Dold's repaired lawn mowers. Lawnmowers were a product sold on site.

What is the point of the sentence? The purpose seems to be to describe the Dold's existing operation: sales and service of lawn mowers. Why is this important? It is an emphasis that the existing operation was not a repair operation only, but instead a sales and service operation. Zoning often couples uses. A common example is that a zoning district might allow a restaurant and bar, but not a bar alone. Looking at the context, the sentence immediately before said there is no automotive service garage. Putting the two sentences together, the point is that service operations alone do not exist. The use is a somewhat higher use, sales and service. Another possible point is that by describing the use as being limited to products sold on site, the decision might preclude the repair of other products, like the repair of automobiles or other types of repair not associated with lawn equipment.

The sentence does not say that the repair is limited to specific lawn mowers actually purchased on the site. The plain meaning of the language should be normally followed. Shanty Town v. Dept. Of Environment, 92 Md. App. 103, 112 (1991) (where language of order was clear and unambiguous, all terms were to be given their plain meaning in construing it.) This is especially true in the case of zoning ordinances, which are in derogation of the common law exercise of property rights. An interpretation ought to be avoided which derogates property rights. As Judge Cathell said in Zent:

> [Zoning] ordinances are in derogation of the common law right to so use private property as to realize its highest utility, and while they should be liberally construed to accomplish their plain purpose and intent, they should not be extended by implication to cases not clearly within the scope of the purpose and intent manifest in their language. Zent, 86 Md. App. at 751

In addition to being beyond the literal language, the interpretation that the sentence means that only lawn mowers actually purchased at the site may be repaired on the site is a plainly ridiculous result. Was Dold's to run a title check on a lawn mower before repairing it? Who keeps a sales receipt for a lawn mower purchased years ago? Dold's operation lasted from 1972 to 1989, a period of seventeen years. Did Commissioner Haines really think that Dold's kept track of every mower sold over those seventeen years and only serviced mowers purchased from them? The situation is absurd. Was it really contemplated that County zoning inspectors would be on call to enforce this provision? The appellate cases teach that interpretations should be consistent with common sense. D & Y, Inc. v. Winston, 320 Md. 534, 538 (1990) ("This Court has said repeatedly that construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense should be avoided.") This restriction fails that test, and it is again hard to believe Commissioner Haines intended this ridiculous result.

Another reason is that if Commissioner Haines did mean to say that the existing lawn mower repair operation was limited to lawn mowers previously purchased on site, which he clearly did not, his conclusion would be invalid as being arbitrary and capricious since it is not based on testimony in the record.

Sedney v. Lloyd, 44 Md. App. 633, 639 (1980) ("...there was no testimony in the administrative record to support [hearing examiner's] delineation....This evidentiary void renders the examiner's decision arbitrary and capricious.").

The most compelling reason which argues against this interpretation is the circumstances of the hearing. All the witnesses agree that Dold's serviced any lawnmower that was brought into the store. Several witnesses – Robert Dold, Judge Jung –were at the Haines hearing, and they agree that the issue of where the lawnmowers were purchased never came up. Exhibit 1 at 78-80 , 109-110 Judge Jung did not understand that the Haines decision had restricted the repair to lawn mowers previously purchased on the site because she asked Mr. Hammond to repair her lawn mower which was not purchased at the site. Id. at 113 At the hearing no one expressed any opposition to the request to recognize the right to use the property for "lawn mower sales and service". So what reason could Commissioner Haines have had to limit repair to lawn mowers purchased on site? The action is inexplicable.

The final significant fact is that, although an experienced lawyer, Commissioner Haines did not put the so-called restriction in the order itself. The Order here is quite detailed, and spells out in minute detail what uses were allowed, and the restrictions on those uses. For example it includes the sale of lawn and garden equipment, but not contractor's equipment storage yards or service garages. Exhibit 2 at pp. 7-8 If Commissioner Haines meant to restrict lawn mower repair to those mowers actually purchased on site, why in the world

didn't he say this? His opinion was a quasi-judicial decision, and it is a universal rule that the terms of a decision are set forth in the order not in the opinion. Thomas v. Dep't Of Health & Mental Hyg., 62 Md. App. 166, 173 (1985) ("...it is to the final order, not the opinion, which we look.) McCann v. McGinnis, 257 Md. 499, 505 (1970), ("'The opinion of the court does not constitute a part of the decree * * *. It is the expression of the reasons by which the judge reaches his conclusion. The decree on the other hand, is the fiat or sentence of the law, determining the matter of the controversy.'") (quoting MILLER, EQUITY PROCEDURE § 260)

For all these reasons, the most sensible result – one that is based on the literal language as well as on the relevant facts and circumstances and context – is that the sentence means literally what it says, that Dold's lawn service included the sale of lawn mowers and the service lawn mowers. It may be that Commissioner Haines meant to limit it to the sales and service of lawnmowers, which he did by including both terms in the order.

Apart from everything else, Mr. Hammond has a right to make a reasonable ancillary or accessory use of the admitted non-conforming use of the general store by intensifying the use to include lawn mowers sales and service just as Dold's did back in 1972, which continued without objection for 17 years. McKemy and Zent, supra. The record is devoid of any real objection to the lawn mower sales and service. It operated without objection for seventeen years. Judge Jung, for example, did not oppose the continued uses during the Haines hearing back in

1989. Exhibit 1 at pp 109-111 This is a case very much like Zent, supra, where the Board of Appeals held the use was an impermissible non-conforming use, and Judge Luke Burns in the Carroll County Circuit Court held that it was a permissible intensification of the non-conforming use. The same situation exists here. This request to re-instate the use, which continued without objection for seventeen years, is a permissible intensification of the non-conforming general store and should be so ordered by the Court.

3. The Facts of This Case Meet the Test for Estoppel As Set Forth In the *Permanent* Case.

The Board held that it "was not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by petitioner in this case for consideration". (Exhibit 6 at p. 4)

The authority of the Board of Appeals to consider estoppel was specifically considered by the Court of Special Appeals in Relay v. Sycamore, 105 Md. App. 701, 721 (1995). The Board maintained there as it does here that it had no jurisdiction to rule on estoppel. The Court held,

> "Because the CRG and the CBA had proper authority to consider the vested right s issue, it follows that they could also consider the issue of zoning estoppel".

The leading case in Maryland on estoppel was in fact an appeal from a board of appeals. Prince George's County v. Sunrise Dev. Ltd Partnership, 330 Md. 297 (1993). A more recent case goes on for 34 pages examining in detail the estoppel found by the Board of Zoning Appeals of the Town of Sykesville and

ends up affirming the Board's decision that the Town was estopped. Sykesville v. West Shore, 110 Md. App. 300 (1996). Another case which affirmed a decision of a board of appeals that estoppel existed is Pemberton v. Montgomery County, 275 Md. 363 (1975).

It is hard to imagine a more compelling case for estoppel. This was not some casual statement by a County employee, but rather a definite procedure which the County instituted to give assurance about zoning. Mr. Hammond was advised by the County that this was the method to obtain a clear resolution of what uses were allowed. Exhibit 1 at pp. 29-33 He wrote a letter describing his situation, saying that he was considering the purchase of the property, and inquiring specifically about the lawn mower sales and service, including "any restrictions" on the permitted uses. Id. The County official wrote back and recited the permitted uses as contained in the order. Id. This letter was written in 2001, some 13 years after the original order. Then it was not until early 2003, approximately two years later, after the purchase and the completion of the work, that the County advised Mr. Hammond of the restriction and recommended a special hearing. The Board of Appeals noted that it is "open to speculation" whether the County zoning official, Mr. Moxley, read the Haines Opinion before he wrote the letter to Mr. Hammond. Exhibit 4, Board Opinion, p. 4 This "speculation" is incorrect. There is a well-founded presumption of regularity with respect to administrative procedures, that is that the official performed his or her duty. Balto. Lutheran High Sch. v. Emp. Sec. Adm., 302 Md. 649, 662-663 (1985)

("...decisions of administrative agencies are prima facie correct and carry with them the presumption of validity.") It would be rather amazing if Mr. Moxley had not read the decision, especially since he cites the uses allowed in the Haines order almost verbatim.

The leading case in Maryland on estoppel is Permanent Fin.Corp. v Montgomery County, 308 Md. 239 (1986) It recites the classic definition of estoppel:

> "Equitable estoppel is the effect of voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy". Permanent at 247, citing 3 J.Pomeroy, Equity Jurisprudence, Section 804 (5th ed., 1941).

The Court of Appeals also quoted the McQuillin treatise on municipal law:

> Although there is authority to the effect that the doctrine of estoppel does not apply as against a city, many decisions have held that the doctrine may be applied to municipal, as well as private, corporations and citizens, where appropriate circumstances, justice and right so require. The assertion of the doctrine in proceedings to enjoin the violation or enforcement of municipal ordinances ... is common. However mere nonaction of municipal officers is not enough to establish an estoppel; there must have been some positive acts by such officers that have induced the action of the adverse party. It must appear, moreover, that the party asserting the doctrine incurred a substantial change of position or made extensive expenditures in reliance on the act". Permanent, at 248-249, citing 3 A McQuillin, Municipal Corporations Section 27.56 (3rd rev.ed).

The Court of Appeals engaged in a further extensive analysis of the particular issue of estoppel against a municipal corporation, and held that it would

arise when the permit was proper when issued. A recent example of this is Sykesville v. Westshore Communications, 110 Md. App. 300 (1996), which held that vested rights do prevent a subsequent change in zoning when a proper permit issues and a person starts construction so as to acquire vested rights. At the opposite end of the spectrum is where the permit was blatantly illegal and no estoppel can exist. An example of this is Inlet Associates v. Assateague House, 313 Md. 413 (1988) where the City charter specifically required an ordinance for a street closing and the Court of Appeals held there could be no estoppel arising where the closing was done by resolution rather than by ordinance. Another case along the same lines is Anne Arundel County v. Muir, 149 Md. App. 617 (2003), where the Court held that the statute in question was clear and no estoppel could accrue from an erroneous interpretation of it.

Furthermore, the instant case is almost on all fours with the test for estoppel promulgated in the Permanent case. In Permanent, the Court of Appeals held there could be estoppel where Montgomery County adopted one of two reasonable interpretations of a law, had made that interpretation its standard practice, and where there had been reliance on that interpretation by the partial construction of a building. The Board of Appeals then held that interpretation to be incorrect. The Court of Appeals held that the County was estopped from enforcing the latest interpretation by the Board of Appeals:

> We have no doubt that Permanent designed and built its building to a height of 43 feet through the fourth floor in reliance upon the long standing interpretation of the County, and that this interpretation,

> while subsequently found by the Board of Appeals to be incorrect, was nevertheless reasonable and debatable....it is at least clear that this portion of the decision to issue the permit was not the result of oversight by the County, but rather was consistent with its practice. This being the case, and Permanent having expended substantial funds in reliance upon the permit, it would be inequitable to now permit the County to require the removal of the fourth floor.

Another case that sustained estoppel against a county is Gregg Neck v. Kent County, 137 Md. App. 732 (2001). There was a dispute over the ownership of a pier, which went on for a number of years. The Court held that the County's acquiescence in the private ownership precluded them from later asserting ownership, where the County repeatedly disclaimed ownership in the pier and the private owners made substantial investments. The Court held the County was "equitably estopped" from now asserting ownership.

In Marzullo v. Kahl, 366 Md. 158, n.16 (2001), the Court of Appeals did not find estoppel, as, unlike the instant case, there was no evidence of a practice or interpretation that could be relied upon to support the use the complainant wanted. In that case, the Court said:

> We held (in Permanent) that the county was estopped because the builder had designed and constructed the building in reliance on the building permits and the counties long-standing and reasonable interpretation as to how a building's height should be calculated. The record in the case at bar does not indicate any long-standing practice in Baltimore County to include snakes as farm animals or the raising and breeding of snakes as commercial agriculture.

Applied to these facts, it appears that estoppel as described in Permanent, Gregg Neck and Marzullo should apply in the instant case: Mr. Hammond relied upon a long standing and reasonable interpretation of the law as to the uses

allowed on his property. Certainly the Haines decision is subject to two different but reasonable interpretations. As set out above, there is substantial doubt whether it truly means to limit lawn mower repair to only those mowers purchased on the property. It is apparent from the record that the Haines decision did not limit lawn mower repair to mowers sold at the site. Exhibit 1 at pp 79-80 This was also position taken by the County when Mr. Hammond requested the uses allowed on the premises. This interpretation only changed in 2003, some fifteen years after the original decision, almost two years after the original determination given to Mr. Hammond and after some community opposition to Mr. Hammond's plans.

Mr. Hammond asked for a decision about a non-conforming use, established in the Haines decision, specifically that he wanted to "re-establish" the lawn mower sales and service as part of the non-conforming general store. So having read the decision, Moxley, on behalf of the County, gives him a determination in 2001 on two points (1) that the lawn mower sales and service could be re-established and (2) that lawnmower sales and service was allowed without any stated limitation to only mowers previously purchased onsite. Then several years later Mr. Moxley changes his opinion and advises Mr. Hammond that the language means that he can repair only lawn mowers purchased on site. This interpretation is followed by the Zoning Commissioner, Mr. Kotroco. The Board in its decision comes up with an entirely different interpretation based on the same facts, -- that the use may not be re-established at all.

Assuming for the purposes of argument that the final Board determination is correct, nevertheless the Haines decision and the original Moxley determination were both based the application of the relevant statute to the facts, made by duly authorized officials. These officials are charged with making such rulings. These rulings are relied upon by citizens, in good faith, and who spend significant funds and perform significant work in reliance upon these determinations. The Haines and Moxley decisions had a presumption of regularity and correctness based upon the respect accorded the interpretations given by administrative officials charged with enforcing and interpreting matters. The Hammond facts fit the Permanent holding.

Finally, it appears that under standard contract principles, Mr. Hammond contracted with the County for a determination. It is hornbook law that a contract requires consideration and performance, or as the Court of Appeals stated in Chernick v. Chernick, 327 Md. 470, 479-480 (1992):

> "It is fundamental that in order for a contract to be binding it must be supported by consideration...Consideration necessitates that "a performance or a return promise must be bargained for Restatement (Second) of Contracts § 71 (1981). A performance is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'"

The traditional government defense of sovereign immunity against contract actions is unavailing: Charter counties such as Baltimore County are forbidden from raising sovereign immunity as a defense in actions in contract. MARYLAND CODE ANN., ART. 25A § 1A The County is now estopped to deny the contract.

Baltimore County here has a specific procedure to provide assurance to its citizens that what they are proposing to do is in conformance with the zoning. The County charges a fee for this service, $40.00, which was paid in this case. The very purpose of the procedure is to provide assurance to citizens who are going to rely on this advice. It's a contract between the citizen and the County,--the citizen pays a fee and obtains assurance about the zoning status. Mr Hammond paid the required fee – consideration — for a determination stating the uses permitted on the property—performance. A contract existed between him and the County.

If the County is not estopped, then the County can go around making contracts with its citizens and then simply walk away from them with impunity. This is unworthy of a local government charged with serving its citizens. There is no question that a local government can be estopped to repudiate a contract. A good example is Leaf Co. v. Montgomery County, 70 Md. App. 170 (1987) where the Court of Special Appeals held that Montgomery County was estopped to claim that a contract should have been in writing when it had assured the other party that writing was not necessary and the County had the benefit of the contract.

> County benefited from the contract. Leafco incurred expense in honoring the renewal. The County was not circumventing any legislative intent, as the original contract formed in 1971 was entirely valid. The contract is one for services already performed, which is not susceptible of rescission. It would be inequitable now to permit the County to deny the existence of a contract. Id. at 180

Estoppel often fails on the lack of authority to enter into the contract, the courts holding that citizens are responsible for knowing the limits of the authority

of the contracting officer. Schaefer v. Anne Arundel County, 16 F. 3d 711 (1994). Here the County held itself out as able to give determinations as to what was the permissible zoning. The Mr. Hammond's letter was written to Arnold Jablon, certainly the top zoning official. The County described the subject matter as a "zoning verification letter". There is no question here as to the authority of the zoning official.

This is a classic estoppel case. If Mr. Hammond cannot pursue the use which the County specifically assured him he could, then a grave injustice has occurred. Petitioner notes that he has filed a claim for damages against the County for breach of contract and Mr. Moxley for negligence. The case number for this action is 03-C-03-013238.

IV.
CONCLUSION

It is requested that the Court rule that the James Hammond is entitled to conduct the sales and service of lawnmowers and related garden equipment with no limitation that the mowers and other equipment must have been originally purchased on the site.

Respectfully submitted,

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 20th day of January 2003 2004 ? I mailed a copy of the foregoing Memorandum to Ms. Barbara Jung, 11939 Falls Road, Cockeysville, Md. 21030 – 1606, County Board of Appeals of Baltimore County, 400 Washington, Ave., Room 49, Towson, Md. 21204.

John C. Murphy

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1 nonconforming use that was granted back in 1988, and it's
2 dated October 13, 1988, and I would offer this.
3 THE CHAIRMAN: It says Number A. That will be
4 No. 2, and that is an exhibit.
5 MR. MURPHY: Secondly, as Exhibit B, the letter
6 from J. Robert Haines, the Zoning Commissioner, dated
7 November 30, 1988, in which he transmits the decision on
8 the nonconforming use in 1988, and the decision itself, so
9 they are actually two documents, the transmittal letter
10 and the decision, the Findings of Fact, and the Order in
11 Case 89-204-SPH, which was also November 30, 1988, so this
12 would be --
13 THE CHAIRMAN: Three. Two separate documents.
14 Counsel, any questions?
15 MS. JUNG: Nothing.
16 THE CHAIRMAN: For purposes of numbering, we'll
17 mark the letter No. 3 for the petitioner and Findings of
18 Fact as No. 4.
19 MR. MURPHY: Now, the rest of my documents I will
20 submit through witnesses, but this is a little unusual,
21 but this is very important, because basically this case is

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1 going back to 1988, and in attempting to decide, you
2 three, decide now, what was meant by the decision in 1988,
3 so I'd just like to review the documents I just
4 introduced.
5 The first document, the petition for special
6 hearing was signed by Robert Dold, and a witness or party
7 by the name of Dennis Peddy.
8 Mr. Dold is here today and he is going to
9 testify. I would just call the Board's attention to this
10 petition.
11 It asks for a determination that the Zoning
12 Commissioner hold that the intended use by Mr. Peddy is a
13 nonconforming use, and the intended use at that time was
14 plant and tree sales and seasonal Christmas tree sales.
15 That was Mr. Peddy's intended use
16 At this point in time, this is back in 1988, the
17 property had not been determined that it had any
18 nonconforming use.
19 So in order to make a ruling on the application
20 for the tree and plant sales, Christmas tree sales, the
21 Zoning Commissioner had to make a sort of all-encompassing

Page 12

1 decision, determining what were the nonconforming uses,
2 what was the nonconforming use and the various elements
3 existing on the property.
4 And as part of this petition, there was filed a
5 chronology of the various nonconforming uses. It's on
6 page two of the petition.
7 It starts off in 1915 with a feed and grocery
8 store. Then, in 1972, it picks up Dold's Lawnmower Sales
9 and Service, and that is shown to exist or stated to exist
10 from 1972 to 1988, Dold's Lawnmower Sales and Service
11 first, as I understand it, in the front part of the
12 property, and then from 1982 to 1988 in the rear part of
13 the property.
14 And then a hearing was held, and then my Exhibit
15 3, I guess it is, Mr. Haines, the then-Zoning
16 Commissioner, sent a letter to the attorney for the
17 applicants saying that the application for the
18 nonconforming use had been granted in accordance with the
19 attached order.
20 That letter is dated November 30, 1988, basically
21 a transmittal letter, but the point I'd like to emphasize,

Page 13

1 he's saying it has been granted in accordance with the
2 attached order.
3 Then he transmitted the actual decision, the
4 Findings of Fact and Conclusions of Law, and that is an
5 extensive document, and it's really important that it's
6 been looked at in some detail because it really is sort of
7 the groundwork for this case.
8 It's really the basis for why we're here in the
9 sense there's no question but that it is not a commercial
10 zone, it's a residential zone.
11 The existence of the nonconforming use is the
12 essential issue here. And in the Findings of fact and
13 Conclusions of Law, it recites the petitioner requests for
14 approval of a nonconforming use for a country store.
15 That's how it was described -- first page -- a country
16 store.
17 And then it had various, I guess you'd call them
18 associated uses, or something like that, this is on the
19 first page here of the Findings of Fact and Conclusions of
20 law. A nonconforming use for a country store.
21 And then among the uses that were requested to

EXHIBIT 2

IN RE: PETITION FOR SPECIAL HEARING
WS Falls Road, 2200' NW
Broadway Road
(11943 & 11950 Falls Road)
3rd Councilmanic District
8th Election District
Legal Owner: Robert Dold,
Contract Purchaser:
Dennis Peddy

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* CASE # 89-204 SPH
*

****

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses, namely, Barbara Jung, Mr. Louis J. Pucci, Mr. and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales,

ORDER RECEIVED FOR FILING
By
Date

James Hammond
1517 Applecroft Way
Cockeysville, MD 21230
Telephone: 410-252-0782

EXHIBIT 3

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

RE: Recertification / Clarification of Non-Conforming Use (SPH #89-204)

Property Owner: Mr. And Mrs. Robert E. Dold
Property Location: 11948 Falls Road, Cockeysville, MD 21030
Identification: Tax Map 50, Grid 24, Parcels 267 and 297

Dear Mr. Jablon,

As directed by your office, I am submitting this Letter of Spirit and Intent in order to clarify and re-establish the non-conforming use certification of the above referenced property. I am currently working with the property owner in a transaction involving the property.

The rear 900sf building was formerly approved and used for a lawn mower sales and service operation. Subsequently, the building has been used as a gift shop. I propose to reestablish the lawn mower sales and service operation and continue the additional uses listed below. I would also like assurance that, in the event the building is destroyed, the improvements may be rebuilt.

On April 6, 2001, I reviewed the Decision and Order rendered for the Special Hearing (SPH 89-204) and consulted with the planners on duty that day. Based on the information provided, it is my understanding that the following uses are permitted on the site in perpetuity, i.e., that there are no time limitations or restrictions on the continuation of the uses as approved by the Decision and Order:

1] Lawn mower sales and service
2] Plant and tree sales and Christmas tree sales
3] Gasoline sales
4] Deli / convenience store
5] Gift shop

I request from your office a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses. Also, please provide a discussion of the owner's property rights in the event of destruction of the improvements as well as the proper procedure for rebuilding following such an unlikely event.

Baltimore County
Department of Permits and
Development Management

Permits and Licenses
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3900
Fax: (410) 887-2824

April 20, 2001

EXHIBIT 4

Mr. James Hammond
1517 Applecroft Way
Cockeysville, MD 21030

Dear Mr. Hammond,

RE: Zoning Verification Letter, 11948 Falls Rd.
Cockeysville, MD 21030, 8th Election District

Your letter to Mr. Arnold Jablon, Director of Permits and Development Management, has been referred to me for reply. Based upon the information provided therein and our research of the zoning records, the following has been determined.

The above referenced property is currently zoned RC 4 (Watershed Protection) as per Baltimore County Zoning Map # NW 15D. Included with this response is a copy of a portion of said map

Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, *country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales, and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses.

Pursuant to Section 104.2 of the BCZR, which addresses non-conforming uses, a structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged.

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

Sincerely,

Lloyd T. Moxley
Planner II, Zoning Review

LTM:ltm

Printed with Soybean Ink
on Recycled Paper

IN RE: PETITION FOR VARIANCE W/S of Falls Road, 2,200' N of Broadway Road 8th Election District 3rd Councilmanic District (11942 & 11950 Falls Road) James G. Hammond *Petitioner*	*	BEFORE THE DEPUTY ZONING COMMISSIONER OF BALTIMORE COUNTY CASE NO. 03-366-SPH

* * * * * * * * * * * * * * * * *

EXHIBIT 5

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 owner of the subject property, James G. Hammond. The Petitioner is requesting special hearing relief for property he owns at 11942 and 11950 Falls Road, located in the Cockeysville area of Baltimore County. The special hearing request is to approve the clarification that lawn and garden equipment sales and service are allowed on the subject property with service of equipment not being limited to the products sold on site and to amend the prior orders in Case No. 89-204-SPH and 94-14-SPH.

Appearing at the hearing on behalf of the special hearing request were James Hammond, owner of the property and John C. Murphy, attorney at law, representing the property owner. Also attending the hearing on behalf of the Petitioner were several other citizens, all of whom signed in on either the Petitioner's Sign-In sheet or the Citizen's Sign-In sheet. Several of the residents of the surrounding area appeared in opposition to the Petitioner's request.

Testimony and evidence indicated that the property, which is the subject of this special hearing request, consists of a total acreage of 1.6575 acres, zoned R.C.4. The property is located on the west side of Falls Road, south of its intersection with Greenway Road in Cockeysville. The details of the manner in which the property is improved are more particularly shown on the plat to accompany the Petition for Special Hearing filed in this case.

EXHIBIT 6

IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- LEGAL OWNER / PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/SIDE OF FALLS ROAD, 2,200' N OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD)	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY
8TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT	*	Case No. 03-366-SPH

* * * * * * * * *

OPINION

This matter concerns the nonconforming use of a property for the purpose of lawnmower sales and service. It arises from a decision on a requested special hearing issued by Deputy Zoning Commissioner Kotroco dated April 11, 2003, in which he denied Petitioner's special hearing request to allow sales of lawnmowers and unlimited repairs on the subject site.

An appeal was timely taken by the Petitioner and was heard by the Board of Appeals on June 25, 2003. The Petitioner was represented by John C. Murphy, Esquire, and Protestants, Kim Detrick, Ken Sadofsy, and Barbara Jung, Esquire, adjacent residents, appeared *pro se.* A public deliberation was held on August 26, 2003.

The facts and chronology of this case are uncontraverted by the parties. The site in question has been utilized as a "country store" predating zoning in Baltimore County. From 1972 to 1988, the then-owners, Robert and Nancy Dold, operated a country store on the property, including a lawnmower repair shop.

In 1988, in furtherance of a potential lease to Dennis Peddy, the Dolds requested a special hearing to confirm the continuation of the nonconforming use of the property as a country store and as a lawnmower sales and repair location. In his opinion dated November 30, 1988, then-Zoning Commissioner Robert Haines confirmed the nonconforming use of the country store. In his Opinion (as opposed to the Order which accompanied the Opinion), he limited repair services

1/8/04

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
JAMES G. HAMMOND *
1517 Applecroft Lane
Cockeysville, MD 21030 *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE COUNTY BOARD OF APPEALS No. **3-C-03-12458**
OF BALTIMORE COUNTY *
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE *
TOWSON, MARYLAND 21204

*

IN THE MATTER OF
JAMES G. HAMMOND – LEGAL OWNER *
11942 AND 11950 FALLS ROAD
COCKEYSVILLE, MD 21030 *

8h ELECTION DISTRICT *
3RD COUNCILMANIC DISTRICT

*

CASE NO.: 03-366-SPH
* * * * * * * * * * * *

RECEIVED AND FILED
2004 JAN -8 A 10:58
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

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:

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

03-366-SPH

February 10, 2003	Petition for Special Hearing Request filed by John C. Murphy, Esquire, on behalf of James G. Hammond, seeking clarification that lawn and garden equipment sales and service are allowed with service not being limited to products sold on site and to amend the prior orders in case number 89-204-SPH and 94-14-SPH, if necessary.
February 20	Notice of Zoning Hearing
February 28	Entry of Appearance filed by People's Counsel for Baltimore County
March 4	Publication in newspaper
March 6	Certificate of Posting
March 14	ZAC Summary of Comments
March 20	Hearing Held before the Zoning Commissioner
April 11	Findings of Fact and Conclusions of Law issued by the Deputy Zoning Commission. Petition for Special Hearing Request DENIED.
April 17	Notice of Appeal from John C. Murphy, Esquire, on behalf of James G. Hammond.
June 25	Hearing by Board of Appeals.
Protestant's Exhibit	
1	Two pages – The Falls Road Community Association, Inc.
Petitioner/ Appellant's Exhibits	
1	IDENTIFICATION ONLY – Petitioner's Hearing Memorandum
2	Petition for Special Hearing and Order, dtd October 13, 1988 – marked Exhibit A

	3	Letter dtd November 30, 1988 from J. Robert Haines, Zoning Commissioner to Steven I. Batoff, Esquire.
	4	Zoning Commissioner's Finding of Fact and Conclusion of Law, dtd 11/30/88; case number 89-204-SPH – marked Exhibit B
	5	Undated letter from James Hammond to Mr. Arold Jablon, 2 pages – marked Exhibit C
	6	Letter dtd April 20, 2001 from Lloyd T. Moxley, Planner II, Zoning Review to Mr. James Hammond – marked Exhibit D
	7A-7I	Photographs
	8	Plat, dtd Jan 30, 2003; Scale 1' = 30' – 11943 and 11950 Falls Road
	9	Draft for review purposes, Restrictions to be imposed by Baltimore County Board of Appeals, 11943 and 11950 Falls Road, 2 pages, dtd June 9, 2003 – marked Exhibit F
	10	Sign in sheets – Petition in Support of Lawn and Garden Equipment Repair at 11942 and 11950 Falls Road – 12 pages
	11	Letter dtd December 13, 2002 from Harold H. Burns, Jr., President, Falls Road Community Association to James Hammond – 1 page
	12	Letter dtd March 18, 2003 from Margaret E. Mills addressed To Whom It May Concern – 1 page
	13	Statement of William Sprecher, dtd June 24, 2003 - 1 page
July 28		Memorandum filed by Barbara Jung, Protestant Memorandum filed by John C. Murphy, Esquire, on behalf of Petitioner.
August 26		Board convened for public deliberation
October 17		Opinion and Order issued by the Board of Appeals DENYING Petition for Special Exception.
October 21		Motion for Rehearing filed by John C. Murphy, Esquire, on behalf of Petitioner in response to Board's Order issued October 17, 2003.

October 22	Supplemental Motion for Rehearing filed by John C. Murphy, Esquire, on behalf of Petitioner
October 30	Response to Request for Rehearing filed by Barbara Jung, Protestant
November 5	The Board convened and received argument on the Motion for Rehearing and Supplemental Motion for Rehearing filed by John C. Murphy, Esquire.
November 6	Ruling on Petitioner's Motion for Rehearing filed by the Board – original decision of October 17, 2003 AFFIRMED
November 12	Petition for Judicial Review filed in the Circuit Court for Baltimore County by John C. Murphy, Esquire and John Cannan, Esquire, on behalf of James G. Hammond.
November 19	Certificate of Notice sent to interested parties.
December 15	Transcript of Proceedings filed for the hearing day of November 5, 2003.
January 6, 2004	Transcript of Proceedings filed for the hearing day of June 25, 2003
January 8	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, together with exhibits entered before the Board.

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: John C. Murphy, Esquire
John Cannon, Esquire
Barbara Jung
Kim Detrick
Ken Sadofsky
People's Counsel 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

N O T I C E O F R E C O R D

Case Number: 03-C-03-012458
Administrative Agency : 03-366-SPH
C I V I L

In The Matter of: James G Hammond

Notice

Pursuant to Maryland Rule 7-206(e), you are advised that the Record of Proceedings was filed on the 8th day of January, 2004.

Suzanne Mensh
Clerk of the Circuit Court, per

Date issued: 01/09/04

TO: BOARD OF APPEALS OF BALTIMORE COUNTY
Old Courthouse Room 49
400 Washington Ave
Baltimore, MD 21204

RECEIVED
JAN 13 2004
BALTIMORE COUNTY
BOARD OF APPEALS

12/2/03

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

PETITION OF: *
JAMES G. HAMMOND
1517 APPLECROFT LANE
COCKEYSVILLE, MD. 21030 *

FOR JUDICIAL REVIEW OF THE OPINION OF CIVIL ACTION
THE COUNTY BOARD OF APPEALS NO. 3-C-03-12458
OF BALTIMORE COUNTY *
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MD. 21204 *

IN THE MATTER OF
JAMES G. HAMMOND-LEGAL OWNER
11942 AND 11950 FALLS ROAD *
COCKEYSVILLE, MD. 21030

8TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT *

CASE NO.: 03-366-SPH

*

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BALTIMORE COUNTY
BOARD OF APPEALS

* * * * * * *

RESPONSE TO PETITION

Pursuant to Maryland Rule 7-204 (a), I hereby give notice that I wish to participate as a Party in this action for Judicial Review.

Barbara R. Jung

Barbara R. Jung
11939 Falls Road
Cockeysville, Maryland 21030
410-512-2060

I hereby certify this 2 day of December, 2003, that I mailed a copy of this Response to John C. Murphy, Esq., Suite 206, 516 N. Charles Street, Baltimore, Maryland 21201, to the Board of Appeals for Baltimore County, Old Courthouse, Room 49, Towson, Maryland 21204 and to the Clerk for Baltimore County Circuit Court, County Courts Building, 401 Bosley Avenue, Towson, Maryland 21204.

Barbara R. Jung

11/19/03

IN THE CIRCUIT COURT *
FOR BALTIMORE COUNTY

*

PETITION OF:
JAMES G. HAMMOND *
1517 Applecroft Lane
Cockeysville, MD 21030 *

FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION
THE COUNTY BOARD OF APPEALS No. **3-C-03-12458**
OF BALTIMORE COUNTY *
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE *
TOWSON, MARYLAND 21204

*

IN THE MATTER OF
JAMES G. HAMMOND – LEGAL OWNER *
11942 AND 11950 FALLS ROAD
COCKEYSVILLE, MD 21030 *

8h ELECTION DISTRICT *
3RD COUNCILMANIC DISTRICT

*

CASE NO.: 03-366-SPH

* * * * * * * * * * * *

CERTIFICATE OF NOTICE

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:

John C. Murphy, Esquire
516 North Charles Street, Suite 206, Baltimore, MD 21201

John Cannan, Esquire
516 North Charles Street, Suite 206, Baltimore, MD 21201

James G. Hammond
1517 Applecroft Lane, Cockeysville, MD 21030

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2003 NOV 19 A 11: 20
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

Barbara Jung
11939 Falls Road, Cockeysville, MD 21030

Kim Detrick
11941 Falls Road, Cockeysville, MD 21030

Ken Sadofsky
11944 Falls Road, Cockeysville, MD 21030

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

Carole S. Demilio
Deputy 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

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

I HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has been mailed to John C. Murphy, Esquire, 516 North Charles Street, Suite 206, Baltimore, MD 21201; John Cannan, Esquire, 516 North Charles Street, Suite 206, Baltimore, MD 21201; James G. Hammond, 1517 Applecroft Lane, Cockeysville, MD 21030; Barbara Jung, 11939 Falls Road, Cockeysville, MD 21030; Kim Detrick, 11941 Falls Road, Cockeysville, MD 21030; Ken Sadofsky, 11944 Falls Road, Cockeysville, MD 21030; Peter Max Zimmerman, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204; and Carole S. Demilio, Deputy People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204, this 19th day of November, 2003.

Theresa R. Shelton

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

November 19, 2003

John C. Murphy, Esquire
John Cannan, Esquire
516 North Charles Street
Suite 206
Baltimore, MD 21201

RE: Circuit Court Civil Action No. 3-C-03-12458
Petition for Judicial Review
James G. Hammond – Legal Owner
11942 and 11950 Falls Road
Board of Appeals Case No.: 03-366-SPH

Dear Messrs. Murphy and Cannan:

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: James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
Peter Max Zimmerman / People's Counsel for Baltimore County

Printed with Soybean Ink on Recycled Paper

County Board of Appeals of Baltimore County

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

November 19, 2003

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-03-12458
Petition for Judicial Review
James G. Hammond – Legal Owner
11942 and 11950 Falls Road
Board of Appeals Case No.: 03-366-SPH

Dear Mr. Zimmerman:

Notice is hereby given, in accordance with the Maryland Rules, that a Petition for Judicial Review was filed on November 12, 2003, 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-03-12458**.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Theresa R. Shelton
Legal Secretary

/trs
Enclosure

c: John C. Murphy, Esquire
John Cannan, Esquire
James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
Pat Keller, Director / Planning
Lawrence E. Schmidt, Zoning Commissioner
Timothy Kotroco, Director/PDM

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11/19/03

PETITION OF JAMES G. HAMMOND 1517 Applecroft Lane Cockeysville, MD 21030 FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse, Room 49 400 Washington Avenue Towson, MD 21204 IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- LEGAL OWNER/PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/SIDE OF FALLS ROAD 2,200' N OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD) 8th ELECTION DISTRICT 3rd COUNCIL MANIC DISTRICT CASE No: 03-366-SPH	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY Case No.: C-03-12458

AMENDMENT TO PETITION

The caption of the petition is amended to read the Circuit Court for Baltimore ~~City~~ County

John C. Murphy
John Cannan
516 N Charles Street, Suite 206
Baltimore, MD 21201
(410) 625-4828
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2003 I mailed first class postage prepaid the foregoing Petition to the County Board of Appeals of Baltimore County, Old Courthouse, Room 49, 400 Washington, Ave., Towson, MD 21204.

John C. Murphy

11/12/03

PETITION OF JAMES G. HAMMOND 1517 Applecroft Lane Cockeysville, MD 21030 FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Old Courthouse, Room 49 400 Washington Avenue Towson, MD 21204 IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- LEGAL OWNER/PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/SIDE OF FALLS ROAD 2,200' N OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD) 8th ELECTION DISTRICT 3rd COUNCIL MANIC DISTRICT CASE No: 03-366-SPH	IN THE CIRCUIT COURT FOR BALTIMORE CITY Case No.: C-03-12458

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NOV 17 2003
BALTIMORE COUNTY
BOARD OF APPEALS

PETITION FOR JUDICIAL REVIEW OF THE COUNTY BOARD OF APPEALS OF BALTIMORE' COUNTY'S DENIAL OF JAMES G.HAMMOND'S SPECIAL HEARING REQUEST

1. James G. Hammond through his attorneys, John C. Murphy and John Cannan, petition for judicial review of the County Board of Appeals of Baltimore County's denial of his special hearing request, which was issued on October 17, 2003.

2. The petitioner was a party to the proceeding before the County Board of Appeals.

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2003 NOV 12 P 11: 23
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

3. Petitioner owns the property that was the subject of the appeal before County Board of Appeals, 11942 and 11950 Falls Road, and is aggrieved by the County Board of Appeals' decision.

John C. Murphy
John Cannan
516 N Charles Street, Suite 206
Baltimore, MD 21201
(410) 625-4828
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2003 I mailed first class postage prepaid the foregoing Petition to the County Board of Appeals of Baltimore County, Old Courthouse, Room 49, 400 Washington, Ave., Towson, MD 21204.

John C. Murphy

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

Case Number: 03-C-03-012458

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NOV 17 2003
BALTIMORE COUNTY
BOARD OF APPEALS

TO: BOARD OF APPEALS OF BALTIMORE COUNTY
Old Courthouse Room 49
400 Washington Ave
Baltimore, MD 21204

11/6/03

IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- LEGAL OWNER / PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/SIDE OF FALLS ROAD, 2,200' N OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD)	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY
8TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT	*	Case No. 03-366-SPH

* * * * * * * * *

RULING ON PETITIONER'S MOTION FOR REHEARING

The Board convened on November 5, 2003 and received argument on the Motion for Rehearing and Supplementary Motion for Rehearing filed by John C. Murphy, Esquire, and the Response thereto filed Barbara Jung, *pro se.*

At the conclusion of oral argument, the Board recessed and then reconvened in public deliberation, at which time the Board, having individually read the submissions offered by both parties, and having heard oral argument, unanimously determined that, in the issuance of its original Opinion and Order, there was not present any fraud, mistake, or irregularity so as to alter its original decision issued by the Board under date of October 17, 2003. Therefore, its original decision is AFFIRMED.

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 M. Stahl, Chairman

Margaret Worrall

Charles L. Marks

DATE: November 6, 2003

County Board of Appeals of Baltimore County

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

November 6, 2003

John C. Murphy, Esquire
516 N. Charles Street
Suite 206
Baltimore, MD 21201

RE: *In the Matter of: James G. Hammond - Petitioner*
Case No. 03-366-SPH /Ruling on Motion

Dear Mr. Murphy:

Enclosed please find a copy of the final Ruling on Motion for Rehearing issued this date by the County Board of Appeals of Baltimore County in the subject matter.

Very truly yours,

Kathleen C. Bianco /tls

Kathleen C. Bianco
Administrator

Enclosure

c: James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Code Enforcement, PDM /Attn: Mr. Seidelman
Lloyd T. Moxley /PDM
Timothy M. Kotroco, Director /PDM

Printed with Soybean Ink
on Recycled Paper

10/30/03

IN RE: PETITION FOR SPECIAL HEARING
LEGAL OWNER: JAMES HAMMOND

BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY

CASE NO. 03-366 SPH

Respondent Barbara Jung's Response to Request for Rehearing

On October 17, 2003, The Board of Appeals issued its Opinion in the above case. On October 20 and 21, 2003, the petitioner filed a Motion for Rehearing and a subsequent Motion for Rehearing. Rule 10 of the Rules of Practice and Procedure of the Baltimore County Board of Appeals cites the Revisory Power of the Board. The rule states that the Board can revise its Order in the "event of fraud, mistake or irregularity".

Mr. Murphy, on behalf of the Petitioner, does not specifically delineate which he is arguing, however, I submit there is no evidence of fraud or irregularity. Therefore, he must be arguing mistake. There are two issues raised in the Petitioner's Memoranda seeking a Rehearing. The first is whether the Board made an error in holding that the repair shop was a non-conforming use as opposed to an intensification of the original use as a country store. The second issue is whether the Board of Appeals can act as an Equity Court and find that the County is estopped from enforcing the Zoning Regulations based on the advice given to Mr. Hammond by the County in response to his letter.

NON-CONFORMING USE V. INTENSIFICATION

The Petitioner made the argument about whether the repair shop was an intensification of the country store. The Board was not persuaded by that argument. The Board, in it's Opinion, found that the lawn mower repair business was a separate non-conforming use that had been abandoned. However, if the Board finds the repair shop was an intensification of the non-conforming use of the country store, as opposed to a separate non-conforming use, Mr. Hammond still must contend with **Section 104.1 of the Baltimore County Zoning Regulations** which states " a non conforming use may continue... provided that upon any **CHANGE** from such non conforming use to any other use whatsoever, or any abandonment or discontinuance of such non conforming use for a period of one year or more, the right to continue or resume such non-conforming use **SHALL** terminate". The undisputed, uncontradicted evidence is that lawn mower repairs ceased in 1989. Since then the buildings have been an antique shop and a seasonal Christmas shop. For a number of years, the back buildings were empty. When Mr. Sadofsky and Ms. Detrick moved into their homes, the buildings were not used as a lawn mower repair shop. Using the 'known in the neighborhood" test as enunciated in **Albert Landay v. Board of Zoning Appeals et al** 173 Md. 460, 196 A2d 293, the use abandoned in favor of the lawn mower

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BALTIMORE COUNTY
BOARD OF APPEALS

facility had changed to the extent that neither Mr. Sadofsky nor Ms. Detrick could have had any idea what they were moving adjacent to.

Judge Moylan, in **Fotoryan v. Mayor and City Council of Baltimore City** 150 Md. App. 157 (2003) discusses what constitutes a change in use. In that case, the property owner wished to change a gas station with auto repair as an auxiliary use to an auto repair facility with no gas being sold. The Board of Appeals for Baltimore City held that the property owner's request was a change in use that required a new permit. The Baltimore City Circuit Court as well as the Court of Special Appeals affirmed that decision. If that constitutes a change in use, how can it be argued that lawn mower repair to antique shop to Christmas shop to lawn mower repair is not a change. In **Fotoryan**, Judge Moylan discusses how Courts should pay great deference to the decisions of administrative boards that routinely deal with certain statutes and their interpretation.

Mr. Murphy argues that the holding of the Vermont Court in **Appeal of Gregoire** 742 A.2d 1232 (1999) in not applicable. It is obviously not binding on the Board, but it is certainly persuasive. A full reading of the case indicates that the Vermont statutes and case law on non-conforming uses and change in uses or abandonment are very similar to Maryland's. In the Vermont case, there were 6 camps on a lot. It was a legal non-conforming use because it pre-dated zoning laws. Although four of the buildings were continually used over the years without interruption, two of the other buildings, Camp Mike and The Birches, were not used for a period of time sufficient to meet the Vermont standard of abandonment. The Court held that one piece of property can have multiple non-conforming uses and one and not the other may be abandoned. The Court therefore held that Camp Mike and The Birches had been abandoned and could not be revived. Even if the Board is convinced that the lawn mower repair was not a non-conforming use but intensification, the reason for the abandonment or change in use statutes remain the same. If a landowner stops using a property for a specific use or changes the use, under the statutes in both Vermont and Maryland, the use ceases to exist.

The Board of Appeals, in it's decision, found that "owners of the subject site did indeed allow the non-conforming use of lawnmower repair and service to be abandoned for a period of one year". Even under Mr. Murphy's theory that abandonment does not apply because the lawnmower repair business was an intensification of the original use, he cannot successfully argue that there has not been a change in use. Whether the argument is abandonment or change in use, the uncontradicted evidence is that since 1989, no lawnmower repair business has been conducted on the site and that the building was subsequently used for other uses. The Board clearly had sufficient evidence to rule that the non-conforming use had been abandoned or changed to the extent that it cannot be revived under Section 104.1 and therefore the Request for a Rehearing should be denied.

ESTOPPEL

Mr. Hammond argues in his supplemental Motion for Rehearing that the Board was mistaken when it refused to consider the doctrine of estoppel. Mr. Murphy cites a number of cases, however those cases deal with vested rights as opposed to estoppel.

The law of vested rights applies only to situations where a property owner is issued a permit by the County and in good faith reliance on that permit begins substantial construction that is visible to the public. The property owner obtains a vested right in continuing construction even when the County subsequently changes the zoning classification on the subject property. The Court of Special Appeals, in **Relay v. Sycamore**, 105 Md. Ap. 701 at page 725 held that in order to avail oneself of the defense of vested rights, using the strict Maryland rule, that "a landowner may rely on nothing other than a properly issued permit".

Mr. Murphy states that **The Town of Sykesville et al v. West Shore Communications Inc. et al**, 119 Md. Ap. 300 (1996) case holds that the government was estopped from preventing West Shore's use of the property. Although Judge Moyaln discusses the differences between the law of vested rights and zoning estoppel, the holding of the case is that West Shore Communications had a vested right in continued construction based on the issuance of a valid permit and the fact that they had completed substantial construction prior to the change in zoning.

The holding of the Court of Appeals in **Prince Georges County v. Sunrise Development Ltd. Partnership**, 330 Md. 297 (1993) is that because Sunrise had poured a single 2' by 2' footing in the middle of it's 10 acre lot pursuant to a valid permit, there was not sufficient construction viewable by the public to support a claim of vested rights.

The Court of Appeals, in **Pemberton v. Montgomery County, Maryland et al.** 275 Md. 363 (1975) held that Pemberton had a vested right in continued construction because construction was begun pursuant to a valid permit. This is also a vested right case, not an estoppel case.

The factual situation of Mr. Hammond's case is not appropriate for a vested rights argument based on the fact that Mr. Hammond did not rely on a county issued permit, but on the advice of Mr. Moxley as to a permitted use. Further, there was no rezoning which is required in a vested right case.

Similarly, Mr. Hammond cannot rely on the theory of estoppel because the law in Maryland is clear that estoppel can be used only when the County acts in bad faith or in an extremely egregious manner.

The general rule of estoppel when applied to zoning cases in Maryland is that "the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances because of an error or mistake committed by one of it's

officers or agents which has been relied on by a third party to his detriment." **Lipsitz v. Parr** 164 Md. 222 (1933).

The Court of Appeals has not allowed the defense of zoning estoppel when County officials made a mistake by advising the developer that it could convey a right of way by passage of an ordinance as opposed to a resolution (**Inlet Associates v. Assateague House Condominium Association et al,** 313 Md. 413 (1988). The Court of Appeals refused to allow the defense of vested rights or estoppel in a situation where a County official advised a developer that he need not apply for a building permit for his project. That advice was put in writing and in reliance on that the project was built. (**The City of Hagerstown et al v. Long Meadow Shopping Center et al,** 264 Md. 481 (1972).

The Court of Appeals has allowed the defense of estoppel in a situation where a permit was issued for a building that was subsequently found to violate the County's height restriction. The decision to issue the permit was based on an interpretation of the height restriction statute and was consistent with the County's practice in similar cases. The building was completed before the County issued the stop work order. The Court held that since the issuance of the permit was not the result of an oversight or a mistake, but was consistent with the County's practice, that it would be inequitable to enforce the height restriction. (**Permanent Financial Corporation v. Montgomery County, Maryland et al,** 308 Md. 239 (1986). The Court of Special Appeals allowed the builder to assert the defense of estoppel in a case where the County refused to issue a sewer permit. The Court found that since there was a previous Court order directing the County to issue a permit and the County, in violation of that court order refused to do so, that the County had acted in an arbitrary, capricious and potentially contemptuous manner The Court found that such action intended to stall until the County rezoned the property that made it impossible for the developer to build. The Court held "that especially egregious actions of public officials in stalling the issuance of permits in order to eliminate development by downsizing may create a zoning estoppel as to particular properties". (**J. Allan Offen v. County Council for Prince George's County**, 96 Md. Ap. 526 (1993). The Court of Special Appeals remanded the case to the Circuit Court for a factual determination of whether the County had acted in an egregious manner. The Court of Appeals reversed the order for Remand because the issue of estoppel had not been raised or argued by the parties, therefore it should not have been considered by the Court of Special Appeals. The Court further found that zoning estoppel had not yet been recognized in Maryland. **(County Council of Prince Georges County, Md. V. J. Allen Offen,** 334 Md. 499 (1994)

The Court of Appeals, in **Marzullo v. Kahl**, 366 Md. 158, (2001) discussed vested rights and equitable estoppel. This case involved a Baltimore County land owner (Kahl) who raised boa constrictors and pythons on his residentially zoned property. He subsequently applied for and was granted a license and a building permit for a Wildlife

Holding Facility. Subsequently, the landowner's neighbor (Marzullo) filed a request for a Special Hearing to determine whether Mr. Kahl could continue. After a long discussion as to what is the definition of a farm, the Court of Appeals addresses equitable estoppel and vested rights. As to whether Mr. Kahl had established a vested right, the Court held that although he had obtained a permit and started construction, he did not meet the first prong of the vested right test i.e. that the permit was lawful when issued but became unlawful due to a change in zoning. The Court specifically held that because the permit was unlawful from the start and that he was not subjected to a subsequent change in zoning classification, the defense of vested rights does not apply. The Court further found that " generally, in the absence of bad faith on the part of the remitting official, applicants for permits involving interpretations accept the afforded interpretation at their risk." The Court found no bad faith in the decision by the County to issue the permit. The County official made a mistake believing that Mr. Kahl's property qualified as a farm. Therefore the defense of estoppel was not available to Mr. Kahl.

As to the equitable estoppel argument, the Court in **Marzullo** reiterated the general rule as stated in **Inlet Associates v. Assateague House Condominium Associates,** 313 Md. 413, and **Permanent Fin. Corp. v. Montgomery County**, 308 Md. 239. The general rule is that "the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances, because of an error or mistake committed by one of it's officers or agents which has been relied on by the third party to his detriment." The Court reasoned that because the building permit issued to Mr. Kahl was in violation of the Zoning laws from the beginning, the doctrine of equitable estoppel couldn't be used.

The Court of Special Appeals, in **United Parcel Service, Inc. v. People's Council for Baltimore County**, 93 Md. Ap. 59 (1992) reversed on procedural grounds **United Parcel Services, Inc. and Baltimore County, Maryland v. People's Counsel for Baltimore County, Maryland,** 336 Md. 569 (1994) held that advice given to U.P.S. by the Zoning Commissioner Arnold Jablon as to what was a permitted use could not turn a non-permitted use into a permitted use. U.P.S. approached Mr. Jablon requesting his opinion as to whether their proposed use was lawful. At a meeting, Mr. Jablon told them it was a permitted use. U.P.S. sent Mr. Jablon a letter confirming his opinion and Mr. Jablon returned the letter to U.P.S. with a note that read "the aforementioned use of this property zoned ML is one that is permitted and is o.k." U.P.S. purchased the property and began building. A neighbor objected and wrote a letter to Mr. Jablon who reiterated that the proposed use was lawful. That decision was appealed to the Board of Appeals. The Court of Appeals subsequently found this was not an appeasable order. However, the Circuit Court for Baltimore County found that the proposed use was not lawful and that the mistaken advice given by Mr. Jablon could not transform a non-permitted use into a permitted use. Therefore United Parcel Services could not argue that the County was estopped from enforcing the applicable zoning regulations. The Court of Special Appeals affirmed this finding.

The Court of Special Appeals again discussed vested rights and zoning estoppel in the case of **Relay v. Sycamore** 105 Md. Ap. 701 at pg. 716 (1995). Judge Davis found that because zoning estoppel is a legal defense and not an equitable remedy, it may be adjudicated in an administrative proceeding. Judge Davis went on to find that "administrative negligence" is not enough to support a claim of zoning estoppel.

The Court of Special Appeals held that the County's action, although it may show negligent delay is not enough to support a claim of zoning estoppel. The Court held that "a zoning estoppel may not be found unless (1) the local government acts, or fails to act, in an arbitrary and unreasonable manner, (2) with deliberate intent to delay construction, and (3) the conduct at issue is the proximate cause...". Judge Davis continues " with regard to the first two elements, the fact finder must conclude that the act or omission of government officials were deliberately calculated to deny the property owner his right to use the land in a currently legal manner".

The Court of Appeals in **Sycamore Realty Co. Inc. v. People's Counsel for Baltimore County** 344 Md. 57 (1996) held that because Sycamore had not obtained a permit or begun construction, there was no vested right once the zoning classification was changed. The Court further held that estoppel should not have been considered.

In the present case, Mr. Hammond wrote a letter to Baltimore County asking whether he could operate a lawn mower repair business on the property. Mr. Moxley responded, in Exhibit #1, that "current uses on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case # 89-204SPH. Specifically, the Commissioner approved the following non-conforming use on said property, country store...and lawn mower repair and service...". Mr. Moxley was obviously wrong in that the use had not been in existence for 11 years and therefore was illegal under Baltimore County Zoning Regulation Section 104.1. He made the further mistake that gasoline sales were not included and when questioned, he amended that part of his opinion. As the case law in Maryland makes clear, Mr. Hammond relied on that advice at his own peril. He could have requested a hearing by the Zoning Commissioner prior to purchasing the property pursuant to Baltimore County Zoning Regulation 550.7 to clarify the permissible use of the property.

The County subsequently cited Mr. Hammond for doing repairs on mowers not sold on site and put in motion his request for a Special Hearing. Because Mr. Moxley's advice was wrong from the start, the Petitioner cannot claim the County should be estopped from enforcing Mr. Haine's decision. Mr. Moxley, arguably made a mistake and may be guilty of administrative negligence but there is certainly not one shred of evidence that he acted in an unreasonable and arbitrary manner with the deliberate intent to mislead Mr. Hammond. Because of the state of the law in Maryland in regard to estoppel, Mr. Hammond's claim that the County should be prevented from enforcing the Baltimore County Zoning Regulation 104.1 based on Mr. Moxley's letter fails.

It is true that Mr. Hammond has been put in an untenable position. However, the purpose of Zoning Regulations is to protect ALL landowners. In this case, three Protestants came forward in an attempt to protect the value and integrity of their

properties. It is not equitable for the surrounding property owners to suffer for many years to come based on Mr. Moxley's error.

Therefore I pray the Board of Appeals to find that the use as a lawnmower repair facility has been abandoned or there has been a change is use sufficient to terminate the use and that the County is not estopped from enforcing the Zoning Regulations based on the inadequate advice from Mr. Moxley.

Barbara R. Jung

Barbara R. Jung, Pro Se

I hereby certify that on this 30 day of Oct, 2003, I mailed a copy of this Memorandum to John C. Murphy, Esq., 516 N. Charles Street, Suite 206, Baltimore, Maryland 21201.

Barbara R Jung

Baltimore County
Department of Permits and
Development Management

Permits and Licenses
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3900
Fax: (410) 887-2824

April 20, 2001

Mr. James Hammond
1517 Applecroft Way
Cockeysville, MD 21030

EXHIBIT Ø /

Dear Mr. Hammond,

RE: Zoning Verification Letter, 11948 Falls Rd.
Cockeysville, MD 21030, 8th Election District

Your letter to Mr. Arnold Jablon, Director of Permits and Development Management, has been referred to me for reply. Based upon the information provided therein and our research of the zoning records, the following has been determined.

The above referenced property is currently zoned RC 4 (Watershed Protection) as per Baltimore County Zoning Map # NW 15D. Included with this response is a copy of a portion of said map

Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, *country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales, and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses.

Pursuant to Section 104.2 of the BCZR, which addresses non-conforming uses, a structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged.

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

Sincerely,

Lloyd T. Moxley
Planner II, Zoning Review

LTM:ltm

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10/21/03

IN RE: PETITION FOR SPECIAL HEARING WS Falls Road, 2200 ' north of Broadway Road (11942 & 11950 Falls Road) 8th Election District – 3rd Councilmanic District Legal Owner: James G. Hammond	* * * * * * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 03-366-SPH

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SUPPLEMENTARY MOTION FOR REHEARING

James G. Hammond, Petitioner, by his attorney, John C. Murphy, moves that the Board of Appeals reconsider its decision dated October 17, 2003:

1. At page 4 of its October 17, 2003 decision, the Board refuses to consider the estoppel issue raised by Petitioner arising from the fact that he was explicitly assured in writing by Baltimore County that the zoning permitted lawn mower sales and service and that he undertook to purchase the property and make improvements based on that assurance. The reason given by the Board is that it is "not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by Petitioner in this case for consideration". Again with respect, this statement is in error as a matter of law. Boards of appeal traditionally consider estoppel arising in the zoning context. The leading case in Maryland was in fact an appeal from a board of appeals. Prince George's County v. Sunrise Dev. Ltd Partnership, 330 Md. 297 (1993). A more recent case goes on for 34 pages examining in detail the estoppel found by the Board of Zoning Appeals of the Town of Sykesville and ends up affirming the Board's decision that the Town was estopped. Sykesville v. West Shore, 110 Md. App. 300 (1996).

Another case which affirmed a decision of a board of appeals that estoppel existed is Pemberton v. Montgomery County, 275 Md. 363 (l975).

The ruling of the Board that it will not consider the estoppel issue because it is not a court of law or equity is in error. Indeed it is probably necessary that the issue be raised and decided before the Board of Appeals for a court to consider it.

Petitioner earnestly requests that the Board set aside its October 17, 2003 decision and rule on the estoppel issue. The doctrine of equitable estoppel is a way to avoid the type of financial disaster which exists in this case. The Petitioner is entitled to have its estoppel claim considered and ruled upon by the Board.

Respectfullly submitted,

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 21 day of October, 2003,I mailed a copy of the foregoing Motion to Barbara Jung, Esq., 11939 Falls Road, Cockeysville, Md. 21030 – 1606, attorney for the protestants.

John C. Murphy

10/21/03

IN RE: PETITION FOR SPECIAL HEARING WS Falls Road, 2200 ' north of Broadway Road (11942 & 11950 Falls Road) 8th Election District – 3rd Councilmanic District Legal Owner: James G. Hammond	* * * * * * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 03-366-SPH

****

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BOARD OF APPEALS

MOTION FOR REHEARING

James G. Hammond, Petitioner, by his attorney, John C. Murphy, moves that the Board of Appeals reconsider its decision dated October 17, 2003:

1. Petitioner purchased the property to operate a lawn mower sales and service operation on the express written assurance of the County that this was a permissible use. Because of the County's apparent error, a personal tragedy exists. The store is now closed. The petitioner may file for bankruptcy.

2. With all respect to this Board, it appears that the initial error of the County is being compounded by the Board's decision. The Board rules that the use for lawn mower sales and service is a non-conforming use which lapsed since it has not occurred since 1988. The lawn mower sales and service was never a non-conforming use. The Board appears to be under the misapprehension that lawn mower sales and service was a non-conforming use which predated the zoning. The lawn mower sales and service began in 1972, well after the 1945 zoning. (See the chronology in Exhibit A to Petitioner's Memorandum). Commissioner Haines made no attempt to find that the lawn mower sales and service existed before 1945. Instead, he found that it was a permissible intensification of the original use, p. 6:

"Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. The lawn mower sales and services is a change, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation".

The Vermont case which the Board relies on, Appeal of Gregoire, 742 A.2d 1232 (1999), is not in point since the use which terminated was a non-conforming use which predated the zoning. Commissioner Haines ruled in 1988 that lawn mower sales and service was an intensification of a non-conforming use. The Board is bound by that decision. See McKemy v. Baltimore County, 39 Md. App. 257, 268 (1978)("Both findings, we have stated, were supported by the record, at that time, and therefore should not be questioned now.").

If lawn mower sales and service was a permissible intensification of a non-conforming use in 1988, it is a permissible intensification now. If the use is an intensification of a non-conforming use, then it is a use which the owner has by right. County Com'rs v. Zent, 86 Md. App. 745 (1991).In the absence of any law to the contrary, the right to intensify a non-conforming use lasts as long as the non-conforming use itself. The only way the non-conforming use can be lost is if the general store ceases, which has not occurred. The only real question in the case is whether Commissioner Haines meant to restrict the service of lawn mowers to mowers sold on site. From the Board's oral comments at its deliberations, it appears that the Board does not believe that was his intent.

The Petitioner earnestly asks the board to review again this matter, set aside its October 17, 2003 ruling, and rule on whether the use the Petitioner proposes is

essentially the same lawn mower sales and service approved by Commissioner Haines back in 1988,or if it is not, whether it is within the scope of the existing non conforming use for a General Store which exists on the property.

Respectfullly submitted,

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 10 day of October, 2003,I mailed a copy of the foregoing Motion to Barbara Jung, Esq., 11939 Falls Road, Cockeysville, Md. 21030 – 1606, attorney for the protestants.

John C. Murphy

EXHIBIT A

PETITION FOR SPECIAL HEARING

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY: 89-204-SPH

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 Baltimore County Zoning Regulations, to determine whether or not the Zoning Commissioner and/or Deputy Zoning Commissioner should approve

the continuance of non-conforming use of the property located at

11942-11950 Falls Road. (See Attached)

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

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

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.

MAP 2D
E. D. 1st
DATE 2-2-89
200 ft
1000 ft
DP

Contract Purchaser:	Legal Owner(s):
Dennis Peddy	Robert Dold
(Type or Print Name)	(Type or Print Name)
Dennis Peddy	Robert Dold
Signature	Signature
12717 Falls Road	
Address	(Type or Print Name)
Cockeysville, Maryland 21030	
City and State	Signature

Attorney for Petitioner:

Steven I. Batoff	11948 Falls Road 666-3786
(Type or Print Name)	Address Phone No.
Steven I. Batoff	Cockeysville, Maryland 21030
Signature	City and State
Offit & Batoff, P.A.	
Suite 110, 2330 W. Joppa Rd.	Name, address and phone number of legal owner, contract purchaser or representative to be contacted
Address	
Baltimore, Maryland 21093	Steven I. Batoff
City and State	Name
Attorney's Telephone No.: 296-6444	Offit & Batoff, P.A.
	Ste. 110, 2330 W. Joppa Rd. 296-6444
	Address Phone No.
	Baltimore, Md 21093

ORDERED By The Zoning Commissioner of Baltimore County, this 13th day of October, 1988, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 7th day of December, 1988 at 11 o'clock A.M.

Reassigned to: Dec. 25, 1988 at 9:00 a.m.

Mr. Robert Dold of Baltimore County, Maryland is the owner of 11942 Falls Road and 11950 Falls Road located in the Eighth Election District in Baltimore County, Maryland. The Property is 1.5 acres of land, more or less, and is shown on the Baltimore County tax records as one tract of land leased separately. The Property is zoned RC 5. The history of the use of the Property is as follows:

11950 Falls Road (Building A)

1915-1950 - Han's Feed & Grocery Store - country store
1950-1955 - Enge's General Store - grocery, country store
1955-1972 - Sprecker's General Store - gasoline, country store, grocery, hardware, deli
1972-1982 - Dold's Lawnmower Sales & Service - country store, gasoline, etc.
1982-1988 - Ridge Country Store - gasoline, country store, grocery, antiques

11942 Falls Road (Building B)

1962-1982 - Scientific Plant Service - sales of replacement trees and plant supplies and materials
1982-1988 - Dold's Lawnmower Sales & Service - shrubs and tree sales (Christmas trees), plant supplies and materials

Mr. Dennis Peddy of Baltimore County is interested in leasing the property at 11942 Falls Road. Mr. Peddy intends to use the property to sell flowers, plants and related materials and supplies. Mr. Peddy plans to also sell in December of each year, Christmas trees for a two to three week period. Therefore, the use of the Property by Mr. Peddy is a continuance of the existing non-conforming use. Mr. Peddy intends to improve the appearance of the existing building located on the property located at 11942 Falls Road.

The uses of the Property are so encompassing that Mr. Peddy's intended use of the property at 11942 Falls Road is already covered under the existing permitted uses. However, since Mr. Peddy desires to spend monies to improve the existing building, he needs assurance of the continuance of the non-conforming use. Mr. Peddy is therefore requesting that the Zoning Commissioner certify the continuance of a non-conforming use of the Property.

Mr. Robert Dold and Mr. Dennis Peddy respectfully request that the Zoning Commissioner find that the intended use

BARBARA R. JUNG 11939 FALLS ROAD
COCKEYSVILLE, MARYLAND 21030

October 23, 2003

JOHN C. MURPHY, ESQ.
SIUTE 206 516 N. CHARLES STREET
BALTIMORE, MARYLAND 21201

Re: Case # 03-366SPH

Dear Mr. Murphy,

I received your Motions for Rehearing yesterday. In the certificate of service in both Motions, you refer to me as the attorney for the Protestants. As you well know, in both hearings I represented only myself and that was made clear to both the Board of Appeals members and the Deputy Zoning Commissioner. I have forwarded copies of your Motions to the other Protestants because you did not send them copies.

Sincerely,

Barbara Jung

Barbara R. Jung

Cc: Board of Appeals for Baltimore County

10/17/03

IN THE MATTER OF THE APPLICATION OF JAMES G. HAMMOND- LEGAL OWNER / PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/SIDE OF FALLS ROAD, 2,200' N OF BROADWAY ROAD (11942 AND 11950 FALLS ROAD)	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY
8TH ELECTION DISTRICT 3RD COUNCILMANIC DISTRICT	*	Case No. 03-366-SPH

* * * * * * * * *

OPINION

This matter concerns the nonconforming use of a property for the purpose of lawnmower sales and service. It arises from a decision on a requested special hearing issued by Deputy Zoning Commissioner Kotroco dated April 11, 2003, in which he denied Petitioner's special hearing request to allow sales of lawnmowers and unlimited repairs on the subject site.

An appeal was timely taken by the Petitioner and was heard by the Board of Appeals on June 25, 2003. The Petitioner was represented by John C. Murphy, Esquire, and Protestants, Kim Detrick, Ken Sadofsy, and Barbara Jung, Esquire, adjacent residents, appeared *pro se*. A public deliberation was held on August 26, 2003.

The facts and chronology of this case are uncontraverted by the parties. The site in question has been utilized as a "country store" predating zoning in Baltimore County. From 1972 to 1988, the then-owners, Robert and Nancy Dold, operated a country store on the property, including a lawnmower repair shop.

In 1988, in furtherance of a potential lease to Dennis Peddy, the Dolds requested a special hearing to confirm the continuation of the nonconforming use of the property as a country store and as a lawnmower sales and repair location. In his opinion dated November 30, 1988, then-Zoning Commissioner Robert Haines confirmed the nonconforming use of the country store. In his Opinion (as opposed to the Order which accompanied the Opinion), he limited repair services

only to those machines actually sold on the site. No appeal was taken from his decision. As a result, the Dolds apparently discontinued their lawnmower repair services on the site; and although the property was, in fact, leased to Mr. Peddy who continued to operate the country store, no lawnmower sales or service occurred at the location from 1989 to the present day.

In April 2001, the Petitioner, interested in purchasing the subject property, submitted a request to the Department of Permits and Development Management for a clarification of the nonconforming status of the property and its permitted uses. He stated, in part, that "...I am submitting this letter of spirit and intent in order to clarify and **reestablish** the nonconforming use certification of the above-referenced property." [Emphasis added.] On April 20, 2001, he received a response from the Department which referenced Commissioner Haines' earlier decision as to the site's permitted uses. Based upon this letter, Petitioner relates that he did in fact purchase the property in 2002.

Testimony reveals that in early 2003, just prior to starting once again to sell and repair lawnmowers on the subject site, Petitioner was made aware by the community association, neighbors, and by the issuance of a violation notice from the Baltimore County Zoning Enforcement Office, that a controversy apparently still existed as to the site's use relative to lawnmower sales and services. He then requested this special hearing, upon which the instant case before the Board arises.

Section 101 of the *Baltimore County Zoning Regulations* [BCZR] defines a nonconforming use as "a legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use." It is well settled in Maryland that the zoning authorities of each county maintain the right to limit the ability to change, expand, or alter nonconforming use. It has further been clearly held that the purpose of

these restrictions is to achieve the ultimate elimination of nonconforming use and that end statutes regarding such uses must be strictly construed to accomplish that purpose. *County Council of Prince George's County, Maryland v. E. L. Gardner, Inc.*, 293 Md. 259. To that end, § 104.1 of the BCZR, relating to nonconforming uses, states that:

> 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.

The Maryland Court of Appeals has held, in *Albert Landay v. Board of Zoning Appeals et al*, 173 Md. 460 (1937) that the definition of "existing use" as used in the statute should mean "the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose i.e. the conduct of a business." In other words, when people move into a neighborhood, they should be able to reasonably identify the existence of a nonconforming use in their area in order that they might make an appropriate decision as to whether or not they desire to purchase in the vicinity of such nonconforming use.

The uncontroverted testimony is clearly that the country store existed prior to the imposition of zoning regulations in Baltimore County. The question of such a use in existence was reconfirmed in Commissioner Haines' decision. Although Petitioner questions whether the restrictions on lawnmower repairs contained in Commissioner Haines' decision appearing in the body rather than in the Order at the conclusion of his Opinion are valid, the historical timeframe of the fact of lawnmower sales and service on the subject property is unquestioned. No lawnmower repairs had occurred on the subject site since 1988.

This Board looks with approval upon the conclusions of the Supreme Court of Vermont in the case of *Appeal of Gary and Suzanne Gregoire*, 170 Vt. 556, 742 A.2d 1232 (1999) in

which that Court held that a particular property could be assigned more than one nonconforming use, some of which might be abandoned while others continued unabated. Although there appears to be no Maryland case law on the point, we read this decision in conjunction with *Landay, supra* and reject Petitioner's contention that, even though no lawnmower repairs were done on the subject site for the past 15 years, the continued nonconforming existence of the country store carries with it the right to essentially reinstate the nonconforming use of sales and repair of lawnmowers at this time.

This Board unanimously finds that the owners of the subject site did indeed allow the nonconforming use of lawnmower sales and service to be abandoned for a period exceeding one year; and that, pursuant to *Baltimore County Zoning Regulations* § 104.1, the permission to carry on those activities at the subject site no longer exists. For reasons stated above, those nonconforming activities not so abandoned may in fact continue.

Finally, we are not unmindful of the position in which the Petitioner was placed by virtue of the letter to him of April 20, 2001 from the Baltimore County Department of Permits and Development Management. It was arguably not unreasonable for him to rely upon that communication to proceed with his project. It is only a matter of conjecture on the part of this Board as to whether or not the writer of that letter, Mr. Lloyd T. Moxley, read the entire Haines opinion or just the Order which accompanied it. This Board believes, however, that the letter in no way altered the facts or the applicable statutes and law in this case, and therefore was not significant in reaching this decision. Moreover, this Board has clearly and traditionally been limited in its jurisdiction to those subject areas specifically granted to it under statute. We are not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by Petitioner in this case for consideration.

For the reasons set forth above, we therefore unanimously deny the Petitioner's request for special hearing.

ORDER

THEREFORE, IT IS THIS 17th day of October, 2003 by the County Board of Appeals of Baltimore County

ORDERED that, for the reasons as stated in the foregoing Opinion, Petitioner's request for special hearing be and the same is hereby **DENIED.**

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 M. Stahl, Chairman

Margaret Worrall

Charles L. Marks

County Board of Appeals of Baltimore County

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

October 17, 2003

John C. Murphy, Esquire
516 N. Charles Street
Suite 206
Baltimore, MD 21201

RE: *In the Matter of: James G. Hammond -*
Legal Owner /Petitioner /Case No. 03-366-SPH

Dear Mr. Murphy:

Enclosed please find a copy of the final Opinion and Order issued this date by the County Board of Appeals of Baltimore County in the subject matter.

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*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Kathleen C. Bianco /trs

Kathleen C. Bianco
Administrator

Enclosure

c: James G. Hammond
Barbara Jung
Kim Detrick
Ken Sadofsky
Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Code Enforcement, PDM /Attn: Mr. Seidelman
Lloyd T. Moxley /PDM
Timothy M. Kotroco, Director /PDM

Printed with Soybean Ink
on Recycled Paper

7/1/03

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
WS Falls Road, 2200 ' north of	*	
Broadway Road	*	BOARD OF APPEALS
(11942 & 11950 Falls Road)	*	
8th Election District – 3rd Councilmanic	*	OF
District	*	
Legal Owner: James G. Hammond	*	BALTIMORE COUNTY
	*	
	*	CASE NO. 03-366-SPH

****

REPLY MEMORANDUM

James G. Hammond, Petitioner, by his attorney, John C. Murphy, for reply to the memorandum filed by Barbara R. Jung says:

1. Non-conforming use. Ms. Jung states the question as:

"The first is whether the Board made an error in holding that the repair shop was a non-conforming use as opposed to an intensification of the original use as a country store".
She then says:

"The Petitioner made the argument about whether the repair shop was an intensification of the country store. The Board was not persuaded by that argument. The Board, in its opinion, found that the lawn mower repair business was a separate non-conforming use that had been abandoned".
But Ms. Jung and the Board are both wrong. Commissioner Haines ruled on this very point back in 1988, at a hearing which Ms. Jung attended. He said, Opinion p. 6:

"Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. The lawn mower sales and services is a change, however, it is also a mere intensification of the Farm and /or Feed Store which grew into the Lawn and Garden Supply operation".

So it was Commissioner Haines who held that the use was an intensification, not a separate non-conforming use. The Board is bound to follow

the earlier unappealed decision. See McKemy v. Baltimore County, 39 Md. App. 257, 269 (1978)(earlier decision of Board "should not be questioned now").

Therefore, it is apparent that the Board made a fundamental mistake. As described by Ms. Jung, the Board did find that the lawn mower repair was a separate non conforming use, not an intensification. The Board erred. The opinion was indeed mistaken.

Ms. Jung apparently acknowledges that the Board may have erred so she suggests that the Board rewrite its opinion and find that the non conforming use had "changed" so that it met the test of the use the non-conforming use being terminated since it had changed to another use, seasonal Christmas shop.

Again, Ms. Jung has failed to read the earlier decision which she attended back in 1988. At that time Dennis Peddy wished to lease the property for the purpose of plant sales and Christmas tree sales. Commissioner Haines ruled that the plant sales and Christmas tree sales were "accessory activities" to the main use of the General Store. He didn't say that any of the existing uses were terminated because the use was "changed" to plant sales and Christmas tree sales.

In the 1988 ruling, Commissioner Haines ruled that the non-conforming use use was not Christmas tree sales, since they didn't exist in 1945, or lawn mower repair, since that didn't either, but instead a single use: Country Store or General Store, opinion p. 6. So the suggestion that the lawn mower use was lost when the use was "changed" to Christmas tree sales is ludicrous.

Clearly there are a lot of uses one normally associates with a General Store . In 1993, Commissioner Schmidt even ruled that the concept of a General Store encompassed a barber shop. Commissioner Schmidt held,

"The Ridge Store has served the residents of Hunt Valley for many years with basic goods, services and essentials". Case No.94-14-SPH

The Board and Ms. Jung get off the track by seeking to isolate the various uses which make up the General Store and to day that any change in the use demands that somehow the use lapses. Commissioner Haines and Commissioner Schmidt did not do this before because they found that the basic use is the General Store, where the use may change over the years as long as the basic use remains the same. Since this is undoubtedly the case, it follows that the use of lawn mower sales and service does not lapse.

2. The Board erred when it held that it had no jurisdiction to consider estoppel. It held, Opinion p. 4, that it "was not a court of law or equity and will not, therefore, address ourselves to any estoppel or other related issue raised by petitioner in this case for consideration".

Again, the Board erred. In addition to the cases already cited, attention is drawn to Relay v. Sycamore, 105 Md. App. 701, 721 (l995). The Board maintained there as it does here that it had no jurisdiction to rule on estoppel. The Court held,

> "Because the CRG and the CBA had proper authority to consider the vested right s issue, it follows that they could also consider the issue of zoning estoppel".

In short, then, the Board was in error when it refused to consider Hammond's argument with respect to vested rights and zoning estoppel.

Petitioner relies on the case of Permanent Fin. Corp. v. Montgomery Cty, 308 Md. 239 (1986). In that case, the issue was over interpretation of the Zoning code as to how height was to be measured. The zoning official gave an interpretation which, as finally determined by the Board of Appeals, turned out to be wrong. The court accepted the basic principle of equitable estoppel, at p. 247:

> "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding rights, either of property, or contract, or of remedy".

In Permanent, the Court found that the County had an interpretation which the owner relied on when it issued the permit. It found the County was estopped to change its interpretation when the owner had relied and actually constructed the building.

Here what happened was very analgous. The County employee, Robert Moxley, apparently issued the letter to Mr. Hammond based upon the terms of the order as rendered by Commisioner Haines. Indeed this is a venerable way to determine the effect of a decision, -- to look at the order. It is so well established in Baltimore County that the practice is to set forth the terms of all prior orders on the zoning plats.

Just as in Permanent, the Zoning Commissioner eventually ruled that the Haines decision was stated not in the order but in the body of the decision. But this does not mean that the Moxley decision was illegal or beyond his authority. It was

and remains an entirely reasonable decision fully consistent with the prior practices of the County and of administrative bodies and courts. Another interpretation which Mr.Moxley made was that the lawn mower sales and service was not a non conforming use and had not lapsed through non-use. This again was a reasonable interpretation and was in fact followed by Commissioner Kotroco in this case.

Permanent upheld estoppel where the ordinance was open to two reasonable interpretations and the advice was given and followed, which was later determined to be incorrect. Permanent held it was a case where an official makes an erroneous but debatable interpretation of an ordinance which turns out to be incorrect. In that case, estoppel was upheld.

The cases cited by Ms. Jung are where the permit was illegal from the beginning. The rule is that no reliance can convert an illegal permit into a legal one, apparently on the theory that were there is no semblance of compliance with the ordnance, the "deficiency is deemed jurisdictional "., Permanent at 250, citing Jantuasch v. Burough of Vernoa, 41 N. J. Super. 89, 124 A. 2d 14, 16-17 (1956), aff'd, 24 N.J. 326, 131 A. 2d 881 (1957).

If ever there was a case for estoppel, this is it. The Board found that it was not unreasonable for Mr. Hammond to rely on the Moxley communication to proceed with the project. Even Ms. Jung finds that "Mr. Hammond has been put in an untenable position". It is highly relevant that this use existed from 1972 to 1989 apparently without objection, servicing lawn mowers sold on site and those not.

No one objected at the hearing when the use was formally recognized back in 1988. The concept that the service of lawn mowers would only be for lawn mowers sold on site is clearly a ridiculous concept and could not have been the intention of Commissioner Haines. No one has raised any objection as to why Mr. Hammond's use would be somehow more harmful than the use which existed from 1972 to 1989. Mr. Hammond has done everything that could reasonably be required of him. He followed every due diligence avenue. He does not deserve to be left without a remedy by the Board of Appeals.

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828

IN RE: PETITION FOR SPECIAL HEARING
WS Falls Road, 2200' NW
Broadway Road
(11943 & 11950 Falls Road)
3rd Councilmanic District
6th Election District
Legal Owner: Robert Dold,
Contract Purchaser:
Dennis Peddy

* BEFORE THE

* ZONING COMMISSIONER

* OF BALTIMORE COUNTY

* CASE # 89-204 SPH

*

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FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses; namely, Barbara Jung, Mr. Louis J. Pucci, Mr.and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales.

Date 11/3/89 By

Maryland Court of Appeals Reports

PERMANENT FIN. CORP. v. MONTGOMERY CTY., *308 Md. 239* (1986)

518 A.2d 123

PERMANENT FINANCIAL CORPORATION, TRUSTEE v. MONTGOMERY COUNTY, MARYLAND ET AL.

No. 69, September Term, 1985.

Court of Appeals of Maryland.

December 5, 1986.

Appeal from the Circuit Court, Montgomery County, Stanley Frosh, J.
Page 240

[EDITORS' NOTE: THIS PAGE CONTAINED HEADNOTES AND HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
Page 241

Joseph P. Blocker and Larry A. Gordon (Linowes & Blocher, on brief), Silver Spring, for appellant.

Clyde C. Henning, Asst. Co. Atty. (Paul A. McGuckian, Co. Atty. and Alan M. Wright, Sr. Asst. Co. Atty., on brief), Rockville, for Montgomery County, Md., part of appellees.

Nancy M. Floreen, Silver Spring (David O. Stewart and Miller, Cassidy, Larroca & Lewin, on brief), Washington, D.C. for the et al. part of the appellees.

Arthur S. Drea, Jr., Kenneth P. Barnhart, Silver Spring, for The Maryland-National Capital Park and Planning Com'n, other appellees.

Argued before MURPHY, C.J., and SMITH,[fn*] ELDRIDGE, COLE, RODOWSKY, COUCH, and McAULIFFE, JJ.

[fn*] Smith, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

McAULIFFE, Judge.

Pursuant to the authority of a building permit issued by Montgomery County, a developer undertook construction of an office building in Silver Spring, Maryland. Eight and one-half months and more than two million dollars later, when the shell of the building was complete, the County suspended the building permit and issued a stop work order on the grounds that the building violated statutory height

7/28/03

IN RE: PETITION FOR SPECIAL HEARING WS Falls Road, 2200 ' north of Broadway Road (11942 & 11950 Falls Road) 8th Election District – 3rd Councilmanic District Legal Owner: James G. Hammond	*	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 03-366-SPH

****

RECEIVED
JUL 28 2003
BALTIMORE COUNTY
BOARD OF APPEALS

PETITIONER'S HEARING MEMORANDUM

This case concerns the use of a non-conforming commercial property on Falls Road for lawn mower sales and service. James Hammond requests a ruling from the Board that he can operate a business on the property consisting of the sale and service of lawn mowers and other garden equipment. Deputy Commissioner Kotroco ruled that the service of lawn mowers could be only lawn mowers previously purchased at the site. Mr. Hammond requests a ruling that he is not limited to the repair of lawn mowers actually purchased on the property.

I

SUMMARY OF TESTIMONY

In 1988, the then owner, Robert Dold, and a potential lessee, Dennis Peddy, filed an application, which recited that Peddy wanted to lease the property for flowers, plants and supplies, and seasonal Christmas tree sales. (Attached as Exhibit A). They asked that the Zoning Commissioner, J. Robert Haines, rule that these uses were the "continuation of a non-conforming use". With the application they filed a chronology of uses on the site going back to 1915 when Han's Feed & Grocery Store – country store" existed. The chronology said that "Dold's

Lawnmower Sales and Service" existed from 1972 until 1988, utilizing first Building A in the front of the property and then Building B in the rear of the property. The chronology and the request for approval of lawn mower sales and service did not state that the repair of lawn mowers would be limited to mowers previously purchased on the site.

In order to rule on this application, the Zoning Commissioner, Robert Haines, had to find that there was a non-conforming use, which he did. 89 – 204 SPH, Exhibit B. The application was for a non-conforming use for a General Store, which predated the zoning in 1945, with "Lawn Mower Sales and Service". Again there was nothing stated in the application that the lawn mower service was limited to mowers purchased at the property. At page 6 of the opinion, Commissioner Haines determined that the general store use encompassed "lawn mower sales and service" as a permissible intensification. Again this description says nothing about the service being limited to mowers originally sold on the site. This use did not predate the 1945 zoning but was a "mere intensification of the Farm and/or Feed Store which grew into Lawn and Garden Supply operation". (p. 6).

In page 7 and 8 of the decision he issued a formal order:

> "Therefore, It is ORDERED by the Zoning Commissioner of Baltimore County, this 30th day of November, 1988, that the Petition for Special Hearing to approve a nonconforming use for a Country Store, with Food and Grocery sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, not including contractors or

> construction companies, landscaping or trucking operation or an automobile service garage, as indicated on Petitioner's Exhibit I, which shall become the final development site plan and final site plan, be and the same is hereby granted".

It is noteworthy that the order described 13 different uses allowed; and five uses which were specifically not allowed. Among the uses allowed was "Lawn Mower Sales and Service".

In the course of the opinion, Commissioner Haines listed the existing uses that were allowed under the umbrella of the non-conforming use:

> "There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site". Exhibit B, 89-204, p. 7.

The language about lawn mowers is not literally a restriction; it does not say "will not be allowed or permitted." Instead, it seems to be describing an existing use: "The service of lawn mowers <u>is</u>....". In other words, he seemed to be describing the existing use.

At the hearing on June 25, 2003 before the Board, several witnesses testified about the 1988 hearing Robert Dold had attended. He said that he recalls that the lawnmower use was described and that it included the service of all lawn mowers, not restricted to those previously purchased at the property. He recalled no discussion that Commissioner Haines indicated that he was restricting the requested uses in any way and had not understood that the use had been restricted by the 1988 ruling. Judge Barbara Jung also attended the hearing. She

too recalled no particular statement that Commissioner Haines restricted the repair of lawn mowers to those previously purchased at the site. In fact, after Mr. Hammond purchased the property, Judge Jung had requested Mr. Hammond to repair her lawn mower, which she had not previously purchased at the site.

Following the 1988 hearing, the Dolds eventually terminated their lawn mower business since the property was leased to Dennis Peddy.

The Petitioner, James Hammond, purchased the property in 2002. Prior to purchasing it he submitted to the County in April 2001 a "Letter of Spirit and Intent" to "clarify and re-establish the non-conforming use certification" for the property, including "Lawn mower sales and service". Mr. Hammond wrote,

> "The rear 900 sf building was formerly approved and used as a lawn mower sales and service operation. Subsequently, the building has been used as a gift ship. I propose to reestablish the lawnmower sales and service operation....", Exhibit C.

His letter asked for a statement about the permitted uses and "any restrictions on permitted uses". Exhibit C. He received a reply from the County dated April 20, 2001 that the permitted non-conforming uses included "Lawn mower sales and service". Exhibit D. Hammond then purchased the property. At the June 25 hearing, Hammond testified that based upon the County's letter, he was completely confident that he could operate a lawn mower sales and service business and that he was unaware that the use was restricted in any way. He explained at the hearing that the ability to operate this business was his sole motivation in purchasing the property.

Following his purchase of the property, Hammond testified that he made extensive improvements to the rear building in anticipation of operating the lawn mower business. The entire property was in a general run-down shape and he worked long and hard to improve the property; according to Judge Jung, Mr. Hammond "worked like a dog". Because of all the required work, he never actually started the lawn mower business. In early 2003, as he was about to start his lawn mower sales and service business, he received a letter from the Falls Road Community Association, which questioned his proposed use. He then called the County and was told for the first time that there was a dispute about the meaning of the order and that he should seek a special hearing. This hearing resulted in Commissioner Kotroco's ruling that Hammond could not service equipment "belonging to the general public" but was limited to equipment "purchased on site". Exhibit E.

At the hearing on June 25, three witnesses, Robert Dold, Robert Homer and William Spreacher (letter) testified about the prior use, Dold's Lawn Service, which existed on the property from 1972 through 1989. According to them it was typical lawn mower sales and service operation, selling new and used equipment and servicing lawnmowers and related garden equipment such as chain saws, leaf blowers, tillers, etc. The repairs had not been limited to items previously purchased on the site.

James Hammond testified at length. He described his prior career in operating an automobile repair facility in Baltimore City; his interest in the

property for the lawn mower business; his written inquiry to the County and the written response received; and his extensive work to renovate the property and get it ready for business. He said that he simply planned to sell and service lawn mowers and related small engines. He had a franchise arranged for Gravely lawn tractors. He might have one person helping him in the business.

Three adjoining neighbors testified in support of the application. Mrs. Seiber, immediately to the North, Ms Mills, to the West, and Robert Homer, to the South, all testified that Mr. Hammond was a fine neighbor and that they had no objection to this business. Several neighbors testified in opposition, including Judge Jung and Ms. Detrick, across Falls Road, and Ken Sadofsky, who lives to the West. Their concerns revolved around possible commercialization of the property - a "Jiffy Lube" – and possible noise. There was introduced a draft agreement between Mr. Hammond and Judge Jung and Ms. Detrick.

All the witnesses agreed that the country store had been in existence for many years preceding the 1945 zoning, and that such use has continued uninterrupted up to the date of the hearing.

No one had any particular dispute about the request to sell and service garden equipment in addition to lawn mowers since it was clear that the prior use had included all sorts of garden equipment.

II

QUESTIONS PRESENTED

1. What is the effect of the sentence - "The service of lawn mowers is only for products sold on site"?

2. Did the non-conforming use lapse?

3. Is the County estopped to limit service to mowers purchased on site when it did not state any such restriction in written response to Hammond's request?

III

ARGUMENT

1.

The effect of the language is to allow only a sales and service operation, not simply a service operation

There is a real mystery about the meaning of this phrase. As written, it seems to say that the existing operation – conducted by Dold's Lawn Service – was the service only of lawnmowers actually purchased on the site. It says, "The service of lawn mowers is only for products sold on site". It says, literally, that that is the existing use, service only of products sold on site. But the testimony is clear and unequivocal that Dold's had no such limitation. Even Judge Jung agrees that any lawnmower could be repaired at Dold's. So in order for this interpretation to be correct, one has to assume that Commissioner Haines somehow misunderstand the testimony that he heard. From a legal standpoint, if

Commissioner Haines found as a fact something, which had no basis in the record, his decision would be arbitrary and capricious.

Then the restriction does not tie in with what we know about the hearing. Two witnesses before the Board were at the hearing, -- Robert Dold and Judge Jung. Both agreed that there was no discussion by Commissioner Haines about imposing any restriction on the lawnmower repair business. Isn't it inconceivable that he would restrict an existing use without even mentioning it to the parties?

What is the point of the restriction? Did Commissioner Haines really intend that the operator of the lawn service would be limited to mowers originally sold on the property? How in the world would this restriction be enforced? Can one conceive of any analogous service operation that has such a limitation? Auto repairs, bicycle repairs, appliance repairs, - what repair service is limited to products actually purchased on the site? The appellate cases teach that interpretations should be consistent with common sense. D & Y, Inc. v. Winston, 320 Md. 534, 538 (1990). This restriction fails that test, and it is again hard to believe Commissioner Haines intended this.

Finally, if the restriction was intended, why does not the order say this? Certainly Commissioner Haines must have known that it is the universal practice to go to the actual order to read the terms of the decision. It is such a universal practice that the cases hold that the operative terms of a court decision are found in the order, not the opinion. Tiller Construction Company v. Nadler, 334 Md. 1, 12 (1994). Look at the zoning hearing plat in this case,--the County procedures

require that that all prior orders be stated on the plat. The order is quoted verbatim on the plat, and nothing is said about any restriction to products sold on site because it is not stated in the order. Wouldn't Commissioner Haines know that future County officials would be called on to advise citizens about the permissible zoning, and that in order to do this, they would turn to the actual order, as undoubtedly happened here in the written advice given to Mr. Hammond? Why would Commissioner Haines leave it out of the order if he intended it to be effective? In this very same order, he stated certain restrictions, such as that "contractors or construction companies, landscaping or trucking operation or an automobile service garage" are not allowed. Why didn't he limit lawn mower service if this was his intention? Because the terms of a decision are stated in the order and because the order in this case did not include the restriction about service being limited to products sold on site, it is submitted that the Haines decision does not limit the service use to products purchased on site.

For all these reasons, it is just hard to believe that Commissioner Haines really intended to allow a lawn mower service but require that it be limited to products actually purchased at the site. If that was the intention, it was not made legally effective since it was omitted from the operative portion of the decision, the actual order.

There is another interpretation of this language that makes much more sense. Commissioner Haines didn't actually say that the repairs were limited to products purchased on site. He said that the repairs were of products sold on the

site. It is suggested that he was attempting to show that the operation was not simply a service operation, but rather was a sales and service operation. Literally, the Dolds serviced products – lawnmowers –which were sold on the site – lawnmowers. Lawnmowers sold, lawnmowers serviced. You couldn't service lawnmowers unless you sold them, but there was no intention to require that the lawnmowers serviced must have actually been purchased on site. The word "products" is a generic phrase referring to a class, not to individual items. Commissioner Haines did not use the word "purchased". By analogy, zoning laws often couple uses; it is common, for example, that liquor may be sold only in conjunction with a restaurant. In McKemy v.Baltimore County, 39 Md. App. 257, 268 (l978), Judge Wilner held that the non-conforming use was for parking of vehicles as an adjunct to a restaurant business.. It is believed that this is what Commissioner Haines intended, -- to describe the existing use as being an operation which was both the sale of lawnmowers and the service of those products sold, --lawnmowers. The service of lawnmowers was an adjunct to the sale of lawnmowers. This makes sense. It is also consistent with the order which allows "Lawn mower sales and service", a unified use where lawn mower service is allowed as a part of or in conjunction with lawn mower sales.

2.

The non-conforming use is for the country store and it has not lapsed.

The rule established in the zoning code is that non-conforming uses lapse if abandoned or discontinued for a period of one year or more. BCZR 104.1. The use for lawn mower sales and service was discontinued when Dold's Lawn Mower Sales and Service ceased to operate sometime after 1989.

The point, however, is that the lawnmower sales and service was never a non-conforming use. It was not established until 1972. Commissioner Haines allowed the lawn mower sales and service as a permissible intensification of the original non-conforming use. He explained this on page 6 of his opinion, Exhibit B:

> "Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. The lawnmower sales and service is a change, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation."

Commissioner Haines' ruling is consistent with the law on the subject. In the case of McKemy v. Baltimore County, supra, the Court of Special Appeals held that a change in use is one thing, and a permissible intensification is another. If the use has changed, then the original non-conforming use is lost; if it is a mere intensification –where the current activity is within the scope of the non-conforming use – then the original non-conforming use remains. McKemy, supra at 269. For a recent case distinguishing between a non-conforming use per se and permissible changes or intensifications of that non-conforming use, see County Comm'rs v. Zent, 86 Md.App. 745 (1991).

In this case, Commissioner Haines has already determined what is the non-conforming use,--the country store. The lawn mower sales and service is a mere intensification of the non-conforming use, according to the Haines decision. There is no issue about the lapse of the non-conforming use for lawn mower sales and service. The use is allowed as a permissible intensification of the country store, which has never lapsed. The right to have an intensification of a non-conforming use is a matter of right arising from the existence of the non-conforming use. County Comm'rs v. Zent, supra. As long as the non-conforming use remains, the country store, the right to have a permissible intensification remains. It does not lapse since the non-conforming use has not lapsed.

This was obviously the interpretation taken by the County when it issued the letter informing Mr. Hammond that he could have lawn mower sales and service. (Exhibit D) His request specifically noted that the lawn mower use had ceased and that he wished to re-establish it.

3.

The County is estopped to change its position after Mr. Hammond relied on its written advice and purchased and improved the property in reliance on the County's written determination.

It is hard to imagine a more compelling case for estoppel. This was not some casual statement by a County employee, but rather a definite procedure which the County instituted to give assurance about zoning. Mr. Hammond was advised by the County that this was the method to obtain a clear resolution of what uses were allowed. He wrote a letter describing his situation, saying that he was

considering the purchase of the property, and inquiring specifically about the lawn mower sales and service, including "any restrictions" on the permitted uses. The County official wrote back and recited the permitted uses as contained in the order. This letter was written in 2001, some 13 years after the original order. Then it was not until early 2003, approximately two years later, after the purchase and the completion of the work, that the County advised Mr. Hammond of the restriction and recommended a special hearing.

The leading case in Maryland on estoppel is Permanent Fin.Corp. v Montgomery County, 308 Md. 239 (1986), which its attached as Exhibit F. It recites the classic definition of estoppel:

> "Equitable estoppel is the effect of voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, either of property, or contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy". Permanent at 247, citing 3 J.Pomeroy, Equity Jurisprudence, Section 804 (5th ed., 1941).

The Court of Appeals also quoted the McQuillin treatise:

> "Although there is authority to the effect that the doctrine of estoppel does not apply as against a city, many decisions have held that the doctrine may be applied to municipal, as well as private, corporations and citizens, where appropriate circumstances, justice and right so require. The assertion of the doctrine in proceedings to enjoin the violation or enforcement of municipal ordinances ... is common. However mere nonaction of municipal officers is not enough to establish an estoppel; there must have been some positive acts by such officers that have induced the action of the adverse party. It must appear, moreover, that the party asserting the doctrine incurred a substantial change of position or made extensive

expenditures in reliance on the act". Permanent, at 248-249, citing 3 A McQuillin, Municipal Corporations Section 27.56 (3rd rev.ed).

The Court of Appeals engaged in a further extensive analysis of the particular issue of estoppel against a municipal corporation, and held that it would arise when the permit was proper when issued. A recent example of this is Sykesville v. Westshore Communications, 110 Md. App. 300 (1996), which held that vested rights do prevent a subsequent change in zoning when a proper permit issues and a person starts construction so as to acquire vested rights. At the opposite end of the spectrum is where the permit was blatantly illegal and no estoppel can exist. An example of this is Inlet Associates v. Assateague House, 313 Md. 413 (1988) where the City charter specifically required an ordinance for a street closing and the Court of Appeals held there could be no estoppel arising where the closing was done by resolution rather than by ordinance. Another case along the same lines is Anne Arundel County v. Muir, 149 Md. App. 617 (2003), where the Court held that the statute in question was clear and no estoppel could accrue from an erroneous interpretation of it.

In Permanent, the Court of Appeals held that estoppel could take place in what it described as the middle ground, where the meaning was not clear and there was a need for an interpretation. In Permanent, the Court of Appeals held that Montgomey County was estopped to require a floor to be taken off a completed building where the plans had been approved even though a later decision by the Board of Appeals determined that the building official's

interpretation of the ordinance was incorrect. The interpretation was in that middle ground, where the ordinance was ambiguous and an interpretation was needed.

Applied to these facts, it appears that estoppel as described in Permanent should apply. Certainly the Haines decision is not clear. As set out above, there is substantial doubt whether it truly means to limit lawn mower repair to only those mowers purchased on the property. It appears that the County did not change its interpretation until 2003, some fifteen year after the original decision and almost two years after the original determination given to Mr. Hammond.

Another case which sustained estoppel against a county is Gregg Neck v. Kent County, 137 Md. App. 732 (2001). There was a dispute over the ownership of a pier which went on for a number of years. The Court held that the County's acquiescence in the private ownership precluded them from later asserting ownership, where the County repeatedly disclaimed ownership in the pier and the private owners made substantial investments. The Court held the County was "equitably estopped" from now asserting ownership.

Finally, it appears that under standard contract principles, Mr. Hammond contracted with the County for a determination, paid the required fee – consideration, and the County is now estopped to deny the contract. Baltimore County here has a specific procedure to provide assurance to its citizens that what they are proposing to do is in conformance with the zoning. The County charges a fee for this service, $40.00, which was paid in this case. The very purpose of the

procedure is to provide assurance to citizens who are going to rely on this advice. It's a contract between the citizen and the County,--the citizen pays a fee and obtains assurance about the zoning status. If the County is not estopped, then the County can go around making contracts with its citizens and then simply walk away from them with impunity. This is unworthy of a local government charged with serving its citizens. There is no question that a local government can be estopped to repudiate a contract. A good example is Leaf Co. v. Montgomery County, 70 Md. App. 170 (1987) where the Court of Special Appeals held that Montgomery County was estopped to claim that a contract should have been in writing when it had assured the other party that writing was not necessary and the County had the benefit of the contract.

Estoppel often fails on the lack of authority to enter into the contract, the courts holding that citizens are responsible for knowing the limits of the authority of the contracting officer. Schaefer v. Anne Arundel County, 16 F. 3d 711 (1994). Here the County held itself out as able to give determinations as to what was the permissible zoning. The Mr. Hammond's letter was written to Arnold Jablon, certainly the top zoning official. The County described the subject matter as a "zoning verification letter". There is no question here as to the authority of the zoning official.

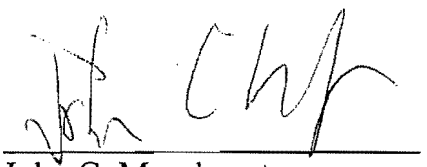
This is a classic estoppel case. If Mr. Hammond cannot pursue the use which the County specifically assured him he could, then a grave injustice has occurred.

IV.

CONCLUSION

It is requested that the board rule that the Petitioner is entitled to conduct the sales and service of lawnmowers and related garden equipment with no limitation that the mowers and other equipment must have been originally purchased on the site.

Respectfully submitted,



John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828

EXHIBIT A

PETITION FOR SPECIAL HEARING

89-204-SPH

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY:

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 Baltimore County Zoning Regulations, to determine whether or not the Zoning Commissioner and/or Deputy Zoning Commissioner should approve

the continuance of non-conforming use of the property located at

11942-11950 Falls Road. (See Attached)

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

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

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.

MAP 2D
E. D. 1A
DATE 12-19
REC'D
1000
DP

Contract Purchaser:	Legal Owner(s):
Dennis Peddy	Robert Dold
(Type or Print Name)	(Type or Print Name)
Dennis Peddy	Robert Dold
Signature	Signature
12717 Falls Road	
Address	(Type or Print Name)
Cockeysville, Maryland 21030	
City and State	Signature

Attorney for Petitioner:

Steven I. Batoff	11948 Falls Road 666-3786
(Type or Print Name)	Address Phone No.
Signature	Cockeysville, Maryland 21030
	City and State
Offit & Batoff, P.A.	
Suite 110, 2330 W. Joppa Rd.	Name, address and phone number of legal owner, contract purchaser or representative to be contacted
Address	
Baltimore, Maryland 21093	Steven I. Batoff
City and State	Name
	Offit & Batoff, P.A.
Attorney's Telephone No.: 296-6444	Ste. 110, 2330 W. Joppa Rd. 296-6444
	Address Phone No.
	Baltimore, Md 21093

ORDERED By The Zoning Commissioner of Baltimore County, this 13th day of October, 1988, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 7th day of December, 1988 at 11 o'clock A.M.

Rescheduled to: Dec. 23, 1988 at 9:00 a.m.

EXHIBIT B

IN RE: PETITION FOR SPECIAL HEARING * BEFORE THE
WS Falls Road, 2200' NW *
Broadway Road * ZONING COMMISSIONER
(11943 & 11950 Falls Road)
3rd Councilmanic District * OF BALTIMORE COUNTY
8th Election District
Legal Owner: Robert Dold, * CASE # 89-204 SPH
Contract Purchaser:
Dennis Peddy *

****

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses; namely, Barbara Jung, Mr. Louis J. Pucci, Mr.and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales.

DATE 8/8/89 BY

ORDER RECEIVED FOR FILING

James Hammond
1517 Applecroft Way
Cockeysville, MD 21230
Telephone: 410-252-0782

EXHIBIT C

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

RE: Recertification / Clarification of Non-Conforming Use (SPH #89-204)

Property Owner:	Mr. And Mrs. Robert E. Dold
Property Location:	11948 Falls Road, Cockeysville, MD 21030
Identification:	Tax Map 50, Grid 24, Parcels 267 and 297

Dear Mr. Jablon,

As directed by your office, I am submitting this Letter of Spirit and Intent in order to clarify and re-establish the non-conforming use certification of the above referenced property. I am currently working with the property owner in a transaction involving the property.

The rear 900sf building was formerly approved and used for a lawn mower sales and service operation. Subsequently, the building has been used as a gift shop. I propose to reestablish the lawn mower sales and service operation and continue the additional uses listed below. I would also like assurance that, in the event the building is destroyed, the improvements may be rebuilt.

On April 6, 2001, I reviewed the Decision and Order rendered for the Special Hearing (SPH 89-204) and consulted with the planners on duty that day. Based on the information provided, it is my understanding that the following uses are permitted on the site in perpetuity, i.e., that there are no time limitations or restrictions on the continuation of the uses as approved by the Decision and Order:

1] Lawn mower sales and service
2] Plant and tree sales and Christmas tree sales
3] Gasoline sales
4] Deli / convenience store
5] Gift shop

I request from your office a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses. Also, please provide a discussion of the owner's property rights in the event of destruction of the improvements as well as the proper procedure for rebuilding following such an unlikely event.

Baltimore County
Department of Permits and
Development Management

Permits and Licenses
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3900
Fax: (410) 887-2824

April 20, 2001

Mr. James Hammond
1517 Applecroft Way
Cockeysville, MD 21030

EXHIBIT D

Dear Mr. Hammond,

RE: Zoning Verification Letter, 11948 Falls Rd.
Cockeysville, MD 21030, 8th Election District

Your letter to Mr. Arnold Jablon, Director of Permits and Development Management, has been referred to me for reply. Based upon the information provided therein and our research of the zoning records, the following has been determined.

The above referenced property is currently zoned RC 4 (Watershed Protection) as per Baltimore County Zoning Map # NW 15D. Included with this response is a copy of a portion of said map

Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, *country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales, and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses.

Pursuant to Section 104.2 of the BCZR, which addresses non-conforming uses, a structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged.

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

Sincerely,

Lloyd T. Moxley
Planner II, Zoning Review

LTM:ltm

Printed with Soybean Ink

IN RE: PETITION FOR VARIANCE W/S of Falls Road, 2,200' N of Broadway Road 8th Election District 3rd Councilmanic District (11942 & 11950 Falls Road) James G. Hammond *Petitioner*	*	BEFORE THE DEPUTY ZONING COMMISSIONER OF BALTIMORE COUNTY CASE NO. 03-366-SPH

* * * * * * * * * * * * * * * * *

Exhibit E

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 owner of the subject property, James G. Hammond. The Petitioner is requesting special hearing relief for property he owns at 11942 and 11950 Falls Road, located in the Cockeysville area of Baltimore County. The special hearing request is to approve the clarification that lawn and garden equipment sales and service are allowed on the subject property with service of equipment not being limited to the products sold on site and to amend the prior orders in Case No. 89-204-SPH and 94-14-SPH.

Appearing at the hearing on behalf of the special hearing request were James Hammond, owner of the property and John C. Murphy, attorney at law, representing the property owner. Also attending the hearing on behalf of the Petitioner were several other citizens, all of whom signed in on either the Petitioner's Sign-In sheet or the Citizen's Sign-In sheet. Several of the residents of the surrounding area appeared in opposition to the Petitioner's request.

Testimony and evidence indicated that the property, which is the subject of this special hearing request, consists of a total acreage of 1.6575 acres, zoned R.C.4. The property is located on the west side of Falls Road, south of its intersection with Greenway Road in Cockeysville. The details of the manner in which the property is improved are more particularly shown on the plat to accompany the Petition for Special Hearing filed in this case.

Maryland Court of Appeals Reports

PERMANENT FIN. CORP. v. MONTGOMERY CTY., *308> <Md>. <239* (1986)

518 A.2d 123

PERMANENT FINANCIAL CORPORATION, TRUSTEE v. MONTGOMERY COUNTY, MARYLAND ET AL.

EXHIBIT F

No. 69, September Term, 1985.

Court of Appeals of Maryland.

December 5, 1986.

Appeal from the Circuit Court, Montgomery County, Stanley Frosh, J.
Page 240

[EDITORS' NOTE: THIS PAGE CONTAINED HEADNOTES AND HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
Page 241

Joseph P. Blocker and Larry A. Gordon (Linowes & Blocher, on brief), Silver Spring, for appellant.

Clyde C. Henning, Asst. Co. Atty. (Paul A. McGuckian, Co. Atty. and Alan M. Wright, Sr. Asst. Co. Atty., on brief), Rockville, for Montgomery County, Md., part of appellees.

Nancy M. Floreen, Silver Spring (David O. Stewart and Miller, Cassidy, Larroca & Lewin, on brief), Washington, D.C. for the et al. part of the appellees.

Arthur S. Drea, Jr., Kenneth P. Barnhart, Silver Spring, for The Maryland-National Capital Park and Planning Com'n, other appellees.

Argued before MURPHY, C.J., and SMITH,[fn*] ELDRIDGE, COLE, RODOWSKY, COUCH, and McAULIFFE, JJ.

[fn*] Smith, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

McAULIFFE, Judge.

Pursuant to the authority of a building permit issued by Montgomery County, a developer undertook construction of an office building in Silver Spring, Maryland. Eight and one-half months and more than two million dollars later, when the shell of the building was complete, the County suspended the building permit and issued a stop work order on the grounds that the building violated statutory height

7/28/03

IN RE PETITION FOR SPECIAL HEARING CASE # 03-366-SPH
11942 and 11950 Falls Road
Legal Owner: James Hammond

RECEIVED
JUL 28 2003
BALTIMORE COUNTY
BOARD OF APPEALS

RESPONDENT BARBARA JUNG'S MEMORANDUM

This matter comes before the Board of Appeals for Baltimore County as an appeal by James Hammond from the Findings of Fact and Conclusion of Law filed by Deputy Zoning Commissioner Timothy Kotroco on April 11, 2003. That was the result of a Hearing held by Mr. Kotroco in which Mr. Hammond requested that the Deputy Zoning Commissioner allow a clarification that would enable Mr. Hammond to service lawn mowers that he had not sold on the property. The Deputy Zoning Commissioner held that in light of then Zoning Commissioner Robert Haines opinion in case # 89-204 that his request should be denied.

The property known as the Ridge Store has operated at11942 Falls Road since before zoning came to Baltimore County. In 1988, when the property was owned by Robert and Nancy Dold, they applied for an approval of a nonconforming use for the property. Between 1972 and 1988, Robert Dold operated a general store in the front of the property and a Lawn Mower Repair Shop in the rear of the property known as 11950 Falls Road. After a hearing in 1989, in case # 89-294SPH,with no opposition from neighbors, Zoning Commissioner Haines approved a nonconforming use for the operation of a country store and lawn mower sales and service. The Commissioner limited the latter use by stating "the service of lawn mowers is only for products sold on site".He further limited it by finding there were no landscaping or trucking operations nor was there an automotive repair facility". However, although the country store part of the operation has continuously operated on the site, the lawn mower repair shop was never operated on the property after the 1989 decision.

In 2002, James Hammond purchased the property. He is currently operating the Ridge Store in the front of the property and intends to do "small engine repairs" in the rear of the property. However in March 2003, he was cited by the Baltimore County Zoning Enforcement Office for repairing equipment not sold on site in violation of the holding in 89-204 SPH. He then applied for a Special Hearing to "clarify that lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site".

After a hearing held on April 11, 2003, Deputy Zoning Commissioner Timothy Kotroco denied that request and found "that all terms and approvals contained in Commissioner Haines' decision in case #89-204 SPH shall remain in full force and

effect". He found that the application before him was an unlawful extension of the nonconforming use.

There are two main issues presented in this Appeal. One is whether the nonconforming use as a Lawn Mower Repair Shop has been abandoned and the second is whether the change in use is a unlawful extension, a lawful intensification or a change in use. A third issue is whether the County or it's employee has any liability for negligence in advising Mr. Hammond as to the status of the non conforming use.

ABANDONMENT

The purpose of allowing non-conforming uses is to allow landowners who were using their property in a way that did not fit in with the surrounding neighborhood to continue such use when the Zoning Regulations came into existence. There is no question that the Ridge Store is a legal non-conforming use. The issue is whether the lawn mower repair part of the business has been abandoned and that therefore the owner, James Hammond, should be stopped from continuing the lawn mower repairs business. The undisputed evidence is that the last time mowers were repaired on the property was 1988. Since then, there have been various other uses such as an antique shop and a Christmas shop. For long periods of time between those uses, the rear buildings were not used for any purpose, The evidence is also undisputed that in 1992, when Kim Detrick moved into her house across the street and thereafter when Ken Sadofsky moved into his house behind this property, the large back building was an antique shop. Not once since 1988 has this property been used for lawn mower repair.

The Court of Appeals of Maryland has held on many occasions that although it recognizes a property owners right to continue his non-conforming use on his property, the Zoning Authorities of each county has the right to limit the ability to change, expand, alter or to recommence after the cessation of the non-conforming use. In the case of CountyCouncil of Prince George's County, Maryland v. E.L. Gardner, Inc. 293 Md. 259. the Court of Appeals acknowledged that the purpose of such restrictions is to achieve the ultimate elimination of the non-conforming use and that to that end the statutes must be strictly construed to accomplish that purpose.

Section 104.1 of the Baltimore County Zoning Regulations states that "a non-conforming use may continue except as otherwise specifically provided in these regulations, provided that upon any change from such non-conforming , 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." The Court of Appeals in Canada's Tavern Inc. et al v. Town of Glen Echo, 260 Md. 271, 271 A2d 664, 1970 held that the Plaintiff had abandoned the right to use his property as a restaurant by ceasing operations between April 30, 1968 and the early Spring of 1969. The applicable statute in that county was Section 111-57 of the Montgomery County code

that stated in part "no nonconforming use, once abandoned, shall thereafter be re-established. For the purpose of the section "abandoned" shall be defined as the cessation of a nonconforming use for a period of six months or more". The Court of Appeals held that" the language of that statute was clear and that the drafters" intended to align itself with those local governments which have found it desirable to delete the factor of intent with respect to the abandonment, discontinuance or cessation of nonconforming uses rather then continuing to run the gamut of its judicial determination in a succession of infinitely variable factual situations". Therefore, the Court held that under the applicable statute in Montgomery County, the Plaintiff had abandoned the nonconforming use and should be estopped from operating the restaurant. The Court of Appeals in Catonsville Nursing Home Inc. et al. V. Aurelia Loveman, 349 Md. 560, 709 A2d 749, (1998) restated the proposition that when the local ordinance relating to abandonment is clear, that the "intent to abandon" test enunciated in Albert Landay v. Board of Zoning Appeals et al., 173 Md. 460, 196 A 293, (1938) is not required.

Baltimore County Zoning Regulation 104.1 could not be any clearer. It states that "if the property owner changes the use in any way or abandons operations for one year, the nonconforming use **SHALL** terminate". The reason for this is that although nonconforming uses exist, they are not favored. The Court of Appeals held in Albert Landay v. Board of Zoning Appeals et al. 173 Md. 460, 196 A. 293, 1937, that the definition of "existing use" as used in the Statute should mean "the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose i.e. the conduct of a business". The purpose of this is so that people who move into the neighborhood while the nonconforming use is in existence would know the use of the property so that they could make an informed decision as the whether they want to live nearby.

The facts in the present case are much stronger than the facts in the Canada's Tavern case supra. The property has not been used for mower repairs in 15 years. The use has been changed over the years. Neighbors have moved in during those 15 years not knowing that they were living next door to a property that could be used for the repair of lawn mowers It is clear that under the applicable Baltimore County Zoning Regulations, the nonconforming use as a lawn mower repair shop has been abandoned and the Mr. Hammond should be estopped from that continued use.

The argument that there has been no abandonment because the Ridge Store has continually operated is without merit. Clearly, one property can have multiple nonconforming uses, in this case the country store, run in the front building of the property and the lawn mower sales and repair, run from the three buildings in the rear of the property. One nonconforming use has not been abandoned, but the other has. Although, there are no Maryland cases on point, the Supreme Court of Vermont, in the case of Appeal of Gary and Suzanne Gregoire 170 Vt. 556, 742 A2d 1232 (1999),held that one property could contain more that one nonconforming use and that one may be abandoned and the other not.

INTENSIFICATION V. EXTENSION
CHANGE IN USE

The general rule for the expansion of nonconforming uses is that it is lawful for the use to be intensified , but unlawful for the use to be extended.. It is also unlawful to continue the nonconforming use once that use has been changed.

The Court of Special Appeals in the case of Leon McKemy, 39 Md. Ap. 257, 385 A2d 96 (1978) formulated a four prong test to determine if a change in use is an intensification or an enlargement:

1. To what extent does the current use reflect the nature and the purpose of the original nonconforming use

2. Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature and kind.

3. Does the current use have a substantially different effect on the community.

4. Is the current use a drastic enlargement or an extension of the original nonconforming use.

The Respondent's position is that the Board does not have to reach the issue of intensification versus expansion because Mr. Hammond has forfeited the nonconforming use base on the change in use.

However, should the Board disagree, the third prong of the McKemy test is very important to consider in this case. The evidence is uncontradicted that Mr. Dold had operated the repair business for years prior to the Hearing before Commissioner Haines. There was no opposition from the neighborhood and in fact there was unanimous support. The neighbors had seen the way he conducted the business. He kept the property in good condition, there was no junk or mowers kept on the parking lot and most

importantly, you could not hear him when he worked. He didn't work weekends and did not start work at 7:00 a.m.

Many of the arguments made in the abandonment section of the Memorandum apply here. The Courts in Maryland have repeatedly held that nonconforming uses are not favored and the local laws restricting them should be strictly construed. City Council of Prince George's County, Maryland v. E.L. Gardner supra . Section 104.1 of the Baltimore County Zoning Regulations discusses change in use as well as abandonment. The statute states that upon a change in use, the nonconforming use **SHALL** terminate.

The evidence is undisputed that the last time mower repairs or service were done on the property was 1987. Since then the rear buildings have been used as a antique shop and a Christmas Shop It was not until 2002, when Mr. Hammond purchased the property that the use reverted to lawn mower repair and service. There is no reasonable argument that can be made that this is not a change in use. The buildings were "known in the neighborhood", the test used by the Maryland Courts, as shops. Judge Moylan, in the case of Fotoryan v. Mayor and City Council of Baltimore City 150 Md. App. 157 (2003) discusses what constitutes change. In that case, the original nonconforming use was a gas station with auto repair as an auxiliary or secondary use. Between 1998 and 1999, the gas tanks were removed and the primary use became an auto repair and service facility. The Court held "that a significant alteration of the proportions of two or more elements in a mixture can just as surely constitute a change as can the introduction of a new element". Therefore the Court affirmed the Board of Appeals in it's denial of Petitioner's request for an application for a nonconforming use of auto repair.

In this case, although the issue before you is not whether to allow a new nonconforming use, it is certainly within your jurisdiction to hold that the change in use between 1988 and 2001 constitutes a change in use and thus an abandonment.

LIABILITY OF BALTIMORE COUNTY

The Board asked the parties to include in the memorandum the issue of whether Baltimore County or a governmental official who gave an opinion for a fee could be held liable if the opinion was wrong. This is in reference to the letter written by Lloyd Moxley who identifies himself as a Planner II, Zoning Review. (See Exhibit 1). This was in response to a letter written by Mr. Hammond to Arnold Jablon, Director of Permits and Development Management. (See Exhibit 2). Mr. Moxley states in his letter that "your letter to Mr. Jablon, Director of Permits and Development Management, has been referred to me for reply". He then goes on to state that the permitted use allows for "lawn mower sales and service". He does not state that the service of mowers is restricted to those sold

on site, as recited by Zoning Commissioner Haines in case number 89-204 SPH. It is clear that a comparison of Commissioner Haines' Opinion (see exhibit 3) and Mr. Moxley's letter, that he is simply repeating a portion of the opinion paragraph of the Order. He cites the case number for the prior opinion, so Mr. Hammond could have read the entire opinion or had an attorney review it. Had he reviewed the entire opinion, the limitation would have been crystal clear.

Mr. Hammond could have requested a hearing by the Zoning Commissioner prior to purchasing the property pursuant to Baltimore County Zoning Regulation 500.7 to request the Commissioner to "determine the existence of any purported non conforming use on any premises or to determine any rights whatsoever...". He elected not to do that and to accept Mr. Moxley's letter as the final say on the issue. A request for a hearing pursuant to500.7 was the method used by the Petitioner in Marzullo v. Kahl 366 Md. 158 (2001) to clarify whether his intended use was permissible.

EQUITABLE ESTOPPEL

Assuming for the sake of argument that Mr. Hammond had a right to rely on Mr. Moxley's letter, the County is not estopped from subsequently citing him for violating the Order in Case number 89-204 SPH. The Court of Appeals held in Lipsitz v. Parr 164 Md. 222 (1932) and in a long line of cases since that " the doctrine of equitable estoppel cannot be invoked to defeat the municipality in the enforcement of it's ordinances, because of an error or mistake committed by one of it's officers or agents which has been relied on by a third party to his detriment". See Inlet Associates v. Assateague House 313 Md. 413 (1988), Cromwell Ward 102 Md. App. 691 (1994) and Marzullo v. Kahl supra.. The Court of Appeals held in Harris Used Car Co., Inc. v. Anne Arundel County 257 Md. 412 (1970 that the property owner must prove that he relied on the issuance of a permit and show substantial prejudice before the County will be estopped. In this case, there is not one shred of evidence as to the amount of money that Mr. Hammond has spent in reliance on Mr. Hammond's letter and such evidence is absolutely required.

IMMUNITY

Baltimore County could not be sued for negligence based on governmental or sovereign immunity. The general principle is that the county cannot be sued if the negligence occurred during the performance of a governmental function, as opposed to a proprietary function. Leese v. Baltimore County 64 Md. App. 442 (1985) and Abrams v. City of Rockville et al. 88 Md. App. 588 (1991). The next question is whether

Mr. Moxley's letter was a governmental function or a proprietary function. A governmental function is defined by the Courts as a function that" is solely for the public benefit with no profit or emolument inuring to the municipality and tends to benefit the public health and promote the welfare of the whole public and has no element of private interest, it is governmental in nature". Austin v. City of Baltimore 286 Md. 51 (1979). There can be no question that enforcement of zoning laws is governmental in nature. The letter signed by Mr. Moxley is clearly a governmental function and the fact that a $40 processing fee was paid does not make it proprietary. Maryland Courts have held in a number of cases that the charging of a minimal fee does not change the function from governmental to proprietary. Baltimore v. State ex rel. Blueford 173 Md. 267 (1937) and Austin supra.

The next issue is whether Mr. Moxley could be sued individually. Court and Judicial Proceedings Article 5-507 (b) states that "an official of a municipal corporation, while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority shall be immune as an official or individual from any civil liability for the performance of the action". The Court of Special Appeals in Robert Biser v. Carol Diebel, et al 128 Md. Ap. 670 (1999) discusses the immunity enjoyed by a public official in the performance of his discretionary duties .In the Biser case, Ms. Diebel was the Director of Planning and Community Development for the town of Bel Air. Mr. Biser who wished to build a commercial building in an area zoned as residential approached her. Ms. Diebel told him to build the buildings and the to apply for a special exception. He followed that advice and was subsequently denied the special exception. Mr. Biser sued the town of Bel Air and the officials, including Ms. Diebel for negligent misrepresentation. The town of Bel Air was granted a summary judgment in their favor based on immunity.

The Court of Special Appeals affirmed the lower court ruling that held that Ms. Diebel was also entitled to a summary judgment based on the immunity afforded by Courts and Judicial Proceedings 5-507. Judge Davis held that " it is well established that an individual who is a public official, as opposed to a governmental employee, is immune from liability for his tortuous conduct occurring while he was performing discretionary, as opposed to ministerial acts in furtherance of his official duties". Judge Davis explained why Ms. Diebel was a public official by citing certain sections of the Bel Air Town Code that created her position and what her duties were. After that analysis, Judge Davis found that Ms. Diebel was a public official.

By applying the statutes in the Baltimore County Code, it is clear that Mr. Jablon was a public official and that Mr. Moxley, acting as his agent as is clearly stated in his letter, enjoys the same immunity. Baltimore County Code section 2-56 establishes the Department of Permits and Development Management and states that it's purpose is to administer and enforce the development process and zoning regulations for Baltimore County. Section 2-57 states that the Department shall be administered by a Director who shall report directly to the County Administrative Officer. Section 403 (d) (9) states that the County Executive shall appoint a County Administrative Officer.

Section (d) (1) of Baltimore County Code 403 states that the duties of the County Administrative Officer is to appoint heads of all offices and departments subject to the approval of the County Executive. This factual situation directly tracks the facts in Biser v. Diebel. supra

Judge Davis also found that Ms. Diebel was acting in her discretionary function when giving Mr. Biser advice about the zoning regulations. In this case, Mr. Hammond wrote to Mr. Jablon, an attorney, to clarify the permitted uses for the property. Certainly, giving that type of advice is discretionary as opposed to ministerial. Discretion was defined by Judge Davis in Biser v. Diebel as "the power conferred upon public officials by law to act officially under certain circumstances according to the dictates of their own judgment and conscience and uncontrolled by the judgment and conscience of others". Clearly, had Mr. Jablon written the letter, he would have been immune from a suit for negligence. Mr. Moxley was acting as his agent on the day he wrote the letter. The letter states "Your letter to Mr. Arnold Jablon, Director of Permits and Development Management, has been referred to me for reply. Bases upon the information provided therein and our research of the zoning records, the following has been determined". Therefore based on agency principals, Mr. Moxley would also be immune from suit.

The most likely cause of action against any county employee is negligent misrepresentation. The elements are:

1. the defendant, owing a duty of care to the plaintiff, negligently asserts a false fact,
2. the defendant intends that his statement will be acted on by the Plaintiff
3. the defendant has knowledge that the Plaintiff will probably rely on the statement, which if erroneous, will cause loss or injury
4. the plaintiff, justifiably, takes action in reliance on the statement
5. the defendant suffers damage proximately caused by the defendant's n4egligence.

In Biser v. Diebel, the Court held that "where failure to exercise due care only creates a risk of economic loss, an intimate nexus between the parties is generally required." The Court went further and stated that " the requirement of an intimate nexus is satisfied by contractual privity or it's equivalent." The Court found that there was no privity of contract between Mr. Biser and Ms. Diebel therefore Ms. Diebel had no duty of care to Mr. Biser therefore there could be no recovery against her. The facts of this case closely track the facts of Diebel. The only additional fact is the assertion that the payment of a $40 processing fee created privity of contract. If a minimal fee cannot change a governmental function into a proprietary function, the processing fee cannot create privity of contract.

In addition, there is no evidence of damages. It is not sufficient to

assert that based on the representation by the County, Mr. Hammond made improvements to the property.

Therefore under the theories of Equitable Estoppel, Sovereign Immunity and Public Official Immunity, the County and Mr. Moxley cannot be successfully sued.

COMMISSIONER HAINES OPINION

As important as what Commissioner Haines said could be done on the property is what he specifically said could not be done. He stated "there are no off site contractors or construction companies using this site, nor landscaping or trucking operations being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site". Mr. Haines was very specific in these holdings in order to limit the operation and it's growth potential. Mr. Murphy's argument that Mr. Haines really meant that " the service of lawn mowers is only for products sold on site" means that he could service the same type of equipment that he sells as opposed to the plain meaning that he could offer service to those people who bought their mower from him is strained at best.

The Hammond property is on Falls Road which has been designated as a scenic route. It is in a residential area. To allow Mr. Hammond to expand or continue the use he requests would greatly devalue the surrounding properties. He argues now that he will greatly limit his use but that is only after he has been cited by Zoning Enforcement and failing to convince Mr. Kotroco to allow him to expand the use. His actions prior to these legal actions speak louder then his words. The neighbors who live nearby have testified before you how the manner in which Mr. Hammond conducted his business prior to being cited by the Zoning Enforcement officer has affected their quality of life and the value of their properties. You have heard testimony of Mr. Hammond's response to the neighbors when approached about their concerns prior to the report to the Zoning authorities. His response was that he could do whatever he wanted on the property, including automobile repairs and a trucking facility. If allowed the requested expansion, Mr. Hammond will continue in this manner until living nearby will be intolerable.

For these reasons, his request to continue or expand the operation of small engine repairs should be denied.

Barbara R. Jung

I hereby certify that on the 28 day of July, 2003, I mailed a copy of the Memorandum to John C. Murphy, Esq. Suite 206, 516 N. Charles Street, Baltimore, Md. 21201.

Barbara R Jung

Barbara R. Jung

4/11/03

IN RE: PETITION FOR VARIANCE W/S of Falls Road, 2,200' N of Broadway Road 8th Election District 3rd Councilmanic District (11942 & 11950 Falls Road) James G. Hammond *Petitioner*	*	BEFORE THE DEPUTY ZONING COMMISSIONER OF BALTIMORE COUNTY CASE NO. 03-366-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 owner of the subject property, James G. Hammond. The Petitioner is requesting special hearing relief for property he owns at 11942 and 11950 Falls Road, located in the Cockeysville area of Baltimore County. The special hearing request is to approve the clarification that lawn and garden equipment sales and service are allowed on the subject property with service of equipment not being limited to the products sold on site and to amend the prior orders in Case No. 89-204-SPH and 94-14-SPH.

Appearing at the hearing on behalf of the special hearing request were James Hammond, owner of the property and John C. Murphy, attorney at law, representing the property owner. Also attending the hearing on behalf of the Petitioner were several other citizens, all of whom signed in on either the Petitioner's Sign-In sheet or the Citizen's Sign-In sheet. Several of the residents of the surrounding area appeared in opposition to the Petitioner's request.

Testimony and evidence indicated that the property, which is the subject of this special hearing request, consists of a total acreage of 1.6575 acres, zoned R.C.4. The property is located on the west side of Falls Road, south of its intersection with Greenway Road in Cockeysville. The details of the manner in which the property is improved are more particularly shown on the plat to accompany the Petition for Special Hearing filed in this case.

ORDER RECEIVED FOR FILING
Date 4/11/03
By P. Jamison

The testimony offered at the hearing demonstrated that Mr. James Hammond is the current owner of the subject property. He purchased the property in March of 2002 and has been renovating the buildings on site. Many of the improvements that have been made to the property have been to the interiors of the buildings on the property, most of which are not apparent to the residents of the area. Mr. Hammond testified that he has not yet begun exterior renovations to the property but intends to do so in the near future.

Prior to his purchase of the subject property, Mr. Hammond submitted a letter to Mr. Arnold Jablon, Director of the Department of Permits & Development Management, requesting clarification of the uses that are permitted on the subject property. Said letter was entered into evidence as Petitioner's Exhibit No. 1. Thereafter, on April 20, 2001 and June 11, 2001, Mr. Lloyd T. Moxley, a representative of the Department of Permits & Development Management, responded to the Petitioner's request. Those letters were submitted into evidence as Petitioner's Exhibit Nos. 2 and 7 respectively. Basically, Mr. Moxley responded to Mr. Hammond's inquiry by reciting the uses which were approved by way of a zoning decision issued by J. Robert Haines, Zoning Commissioner for Baltimore County, dated the 30th day of November, 1988. Mr. Hammond has requested, by way of this special hearing, a clarification of Commissioner Haines' decision to allow him to operate a small engine repair facility on the subject site.

The testimony offered by Mr. Hammond indicated that he proposes to convert the building identified on the site plan as Building "B" into a small engine repair facility. Mr. Hammond is desirous of repairing small engines such as those found on lawn mowers, riding tractors, chain saws and other similarly sized gasoline engines. He intends to service equipment belonging to the general public and not just the equipment that may be purchased on site.

As stated previously, several of the residents who appeared at the hearing testified in opposition to the Petitioner's plans. Testimony was provided by Barbara Jung, as well as Kim

ORDER RECEIVED FOR FILING
Date 4/11/03
By

Detrick, both of whom live on the opposite side of Falls Road from the subject property. These neighbors, as well as Mr. Kenneth Sadofsky who resides to the west of the site, are opposed to the small engine repair facility on the property. These residents are concerned over the noise generated by such a facility and the amount of traffic coming and going to this site. They believe such a use to be an unlawful extension of the non-conforming use that was granted by Commissioner Haines in 1988.

In addition to these concerns, the neighbors object to the manner in which the Petitioner has been utilizing the property since the time of his purchase. Automobiles have been stored and parked in a haphazard fashion on the subject site. Commercial vehicles have also been stored on the property. The site in general has existed in a state of disrepair with equipment and other objects scattered about the property. The Protestants also testified that Mr. Hammond has failed to address the appearance of the property, notwithstanding their attempts to discuss the issue with him. They are strongly opposed to the granting of the special hearing request which would permit Mr. Hammond to expand his use of the property to include a small engine repair facility.

After considering the testimony and evidence offered by the Petitioner, as well as the surrounding neighbors, I find that the special hearing request to allow a small engine repair facility to be permitted on the property should be denied. The decision rendered by Commissioner Haines in Case No. 89-204-SPH, dated November 30, 1988, is very clear. Commissioner Haines was careful to enunciate in his order those uses which were proven at the hearing before him to be truly non-conforming and therefore, permitted. While his order allowed lawn mower sales and service, he indicated on page 7 of his order that the "service of lawn mowers is only for products sold on site." The Petitioner's application in this case before me is an unlawful extension of the approvals granted by Commissioner Haines in Case No. 89-204-SPH and accordingly, should not be permitted to occur on the subject property.

ORDER RECEIVED FOR FILING
Date 4/4/03
By R. Jamison

In making this ruling, I am mindful of the testimony of the Petitioner's witnesses who stated that a prior owner, Mr. Dold, repaired lawn and garden equipment that was not purchased on the premises. From the testimony presented, this occurred on a regular basis. However, such testimony was not sufficient to cause Commissioner Haines to include this activity in his ruling. To the contrary, Commissioner Haines specifically limited the repair of lawn equipment. In the event Mr. Dold was not satisfied with Commissioner Haines' decision in 1988, he should have either filed an appeal or requested a modification at that time. In my opinion, it is not appropriate to expand this use by way of this special hearing request.

THEREFORE, IT IS ORDERED, by the Deputy Zoning Commissioner for Baltimore County, this 11th day of April, 2003, that the Petitioner's Request for Special Hearing, to permit the repair of lawn and garden equipment on the subject property, with service not being limited to products sold on site, be and is hereby DENIED.

IT IS FURTHER ORDERED, that all other terms and approvals contained in Commissioner Haines' decision in Case No. 89-204-SPH shall remain in full force and effect and shall not be affected by this decision.

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

Timothy Kotroco

TIMOTHY M. KOTROCO
DEPUTY ZONING COMMISSIONER
FOR BALTIMORE COUNTY

TMK:raj

ORDER RECEIVED FOR FILING
Date 4/11/03
By R. Jamison

Baltimore County
Zoning Commissioner

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

April 11, 2003

John C. Murphy, Esquire
516 N. Charles Street
Baltimore, Maryland 21201

Re: Petition for Special Hearing
Case No. 03-366-SPH
Property: 11942 & 11950 Falls Road

Dear Mr. Murphy:

Enclosed please find the decision rendered in the above-captioned case. The petition for special hearing has been denied 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,

Timothy Kotroco

Timothy M. Kotroco
Deputy Zoning Commissioner

TMK:raj
Enclosure

Printed with Soybean Ink on Recycled Paper

Copies to:

James G. Hammond
1517 Applecroft Lane
Cockeysville, MD 21030

Bruce Doak
Gerhold, Cross 7 Etzel
320 E. Towsontown Blvd.
Towson, MD 21286

Barbara Jung
11939 Falls Road
Cockeysville, MD 21030

Kim Detrick
11941 Falls Road
Cockeysville, MD 21030

Ken Sadofsky
11944 Falls Road
Cockeysville, MD 21030

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
WS Falls Road, 2200 ' north of	*	
Broadway Road	*	ZONING
(11942 & 11950 Falls Road)	*	
8th Election District – 3rd Councilmanic	*	COMMISSIONER OF
District	*	
Legal Owner: James G. Hammond	*	BALTIMORE COUNTY
	*	
	*	CASE NO. 03-366-SPH

****

PETITIONER'S HEARING MEMORANDUM

Introduction

The Petitioner has filed this request for special hearing to clarify that he is able to use the property for lawn mower service and small engine repair without being limited to the service of lawn mowers originally sold on the property. In Case 89-204 SPH, Commissioner J. Robert Haines issued an order approving a nonconforming use for the subject premises for "Lawn Mower Sales and Service". However, in the body of the decision, the Commissioner mentioned that the repair of lawn mowers had been for products sold on site. The purpose of this hearing is to clarify that the use is allowed as per the order of Commissioner Haines, namely the repair of lawn mowers.

Chronology

1. 1972 – 1988 Dold's Lawnmower Sales and Service operated at the site. The lawn mower sales and service operation is described in the 1988 opinion, 89-204 SPH. At least three witnesses will testify that Dold's lawn mower sales and service serviced all lawnmowers, those sold on the property as well as those not.

The witnesses include Robert Dold, who operated the service with his father, now deceased; Robert Homer, who worked in the service; and William Sprecher, who was the son of the operator of the country store from 1955 to 1972 and who was a customer of the lawn service. Mr. Iver Mindel, a nearby resident, has also written a letter in which he describes being a customer of the Dold lawn mower service as far back as the 1970s.

2. 1988 Case 89-204 SPHF Robert Dold, the owner, filed a petition asking that the non -- conforming use of the property be recognized – country store, gasoline, grocery, deli, antiques, replacement trees, and plant supplies, lawnmower sales and service. The Petition is attached as Exhibit A

3. 1988 Case No. 89 – 204 SPH. Commissioner Haines issues ruling on petition for approval for non-conforming use for:

"Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment". (Emphasis added)

After hearing testimony, Commissioner Haines granted the application but placed certain limitations on it, granting approval for:

"Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and

Equipment for sale, not including contractors or construction companies, landscaping or trucking operation or an automobile service garage…". (emphasis added)

The order is also stated on the plat filed herein, pursuant to County procedures which require zoning restrictions to be stated on the plat.

In the course of the opinion, in the course of describing the existing uses, the opinion states, p. 7:

"The service of lawn mowers is only for products sold on the site".

However, the restriction as to the service of lawn mowers, being limited to products sold on the site, was not placed in the order. The order does contain restrictions on contractors operations. The Opinion and Order are attached as Exhibit B.

4. 2001 Petitioner James Hammond, interested in purchasing the property, writes a "Letter of Spirit and Intent" to Arnold Jablon, submitting the required fee and asking for a letter that the following uses are allowed, including "any restrictions on permitted uses":

"1. Lawn mower sales and service;

2. Plant and tree sales and Christmas tree sales;

3. Gasoline sales;

4. Deli / convenience store

5. Gift shop. "

Hammond's letter is attached as Exhibit C.

5. April 20, 2001. The Department of Permits responds to Hammond's letter by a letter from Lloyd Moxley dated April 20, 2001. That letter states that the zoning records have been researched and that the following uses are permitted by the decision of the Zoning Commissioner in Case No. 89-204 SPH:

"Country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales and accessory lawn and garden supplies and equipment for sale". (Emphasis added)

The County's Spirit and Intent letter is attached as Exhibit D.

6. March 19, 2002. Hammond acquires the property for $250,000.00 and establishes this business:

"Hammond's Small Engine

Complete Gravely Sales, Parts & Engines".

7. December 2002. Permits Office decides non-conforming use does not include service of lawn mowers not sold on site and suggests special hearing.

Argument

The order in case No. 89-204 SPH is clear and unequivocal, - sale and service of lawn mowers. If Commissioner Haines wanted to restrict service to products sold on site, he could have done so by including this restriction in the order. He did include several other restrictions in the order such as construction

companies, automobile service garages, etc. The reference to the existing use for mower service appears to be describing what the actual use is. The opinion does not appear to be stating a restriction. Again, it is impossible to fathom why, if a restriction was intended, it was not stated in the order. It is entirely reasonable for Commissioner Haines to have stated the existing use to be such and such but allowed somewhat broader uses in the order.

A contested case hearing and opinion and order are analgous to trials, opinions and hearings in court cases. There is it clear that the operative effect of a court decree is determined by reference to the order, not to what is stated in the opinion. The leading case in Maryland is Alleghany Corp. v. Aldebaran Corp., 173 Md. 472, 477 (1938) where the Court of Appeals laid down the clear rule: "What the trial court decided must be found, and may only be found, in its orders, ….". Alleghany has been followed by numerous cases, including Tiller Construction Company v. Nadler, 334 Md. 1, 12 (1994).

It is also highly significant that the County wrote Mr. Hammond and specifically affirmed that service of lawn mowers was allowed, without any restriction as to only lawn mowers sold on site. Quite Plainly what Mr. Moxley did was to turn to the order at the end of the 8 page opinion for the actual ruling, - and he thereupon informed Mr. Hammond that lawn mower service was allowed.

Apart from this legal rule, and the express assurances of the County that the proposed use was permitted as a non-conforming use, we have the testimony of Robert Dold, Robert Homer, both of whom worked at the property in the lawn mower service operation, and William Sprecher, a customer, that the use, without any limitation as to only for products sold on site, existed for some 17 years. Commissioner Haines held the lawn mower sales and service to be a mere intensification of the non-conforming use for a country store – hardware store and that is obviously the case. It meets the three tests:

Consistent with the original non conforming use, since country stores - hardware stores often sell and service lawnmowers and other small engines like chain saws;

Just a different manner of utilizing the original non-conforming use;

Has no different effect on the neighborhood;

Not a drastic enlargement or extension of the original non conforming use, for a country store or hardware store.

For these reasons, Petitioner asks that the Commissioner issue the following order:

"The non-conforming uses for the property include the sale and service of lawn mowers and similar small engines, with no limitation that the service is restricted to lawn mowers and small engines sold on the property, but that no landscaping service be operated from the property."

Screening; Vehicles on Property

The County Office of Planning has pointed out that Falls Road is a scenic road and that the lawn and garden equipment should be in a secured area that is screened from public view. It is believed that neighbors have expressed similar concerns. Neighbors have pointed out that in the past vehicles and construction equipment have been stored on the property. Therefore, to meet these concerns, Petitioner suggests a condition be attached to the above order as follows:

Provided that within six months from the date of this order, Petitioner shall have submitted to the Office of Planning for approval a plan for screening lawn and garden equipment from public view and shall have implemented the plan. No vehicles or construction equipment shall be stored on the property. "

Respectfully submitted,

John C. Murphy
516N.Charles St., Suite206
Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

EXHIBIT A

PETITION FOR SPECIAL HEARING

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY: 89-204-SPH

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 Baltimore County Zoning Regulations, to determine whether or not the Zoning Commissioner and/or Deputy Zoning Commissioner should approve ------

the continuance of non-conforming use of the property located at

11942-11950 Falls Road. (See Attached)

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

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

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.

MAP	
	2D
E. D.	1st
DATE	2-2-89
ZCO	K.F.
IDCO	K.F.
DP	

Contract Purchaser:

Dennis Peddy
(Type or Print Name)

Dennis Peddy
Signature

12717 Falls Road
Address

Cockeysville, Maryland 21030
City and State

Attorney for Petitioner:

Steven I. Batoff
(Type or Print Name)

Signature

Offit & Batoff, P.A.
Suite 110, 2330 W. Joppa Rd.
Address

Baltimore, Maryland 21093
City and State

Attorney's Telephone No.: 296-6444

Legal Owner(s):

Robert Dold
(Type or Print Name)

Robert Dold
Signature

(Type or Print Name)

Signature

11948 Falls Road 666-3786
Address Phone No.

Cockeysville, Maryland 21030
City and State

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

Steven I. Batoff
Name
Offit & Batoff, P.A.
Ste. 110, 2330 W. Joppa Rd. 296-6444
Address Phone No.
Baltimore, Md 21093

ORDERED By The Zoning Commissioner of Baltimore County, this 13th day of October, 1988, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 7th day of December, 1988, at 11 o'clock A. M.

Rescheduled to: Nov. 25, 1988 at 9:00 a.m.

Mr. Robert Dold of Baltimore County, Maryland is the owner of 11942 Falls Road and 11950 Falls Road located in the Eighth Election District in Baltimore County, Maryland. The Property is 1.5 acres of land, more or less, and is shown on the Baltimore County tax records as one tract of land leased separately. The Property is zoned RC 5. The history of the use of the Property is as follows:

11950 Falls Road (Building A)

1915-1950 - Han's Feed & Grocery Store - country store
1950-1955 - Enge's General Store - grocery, country store
1955-1972 - Sprecker's General Store - gasoline, country store, grocery, hardware, deli
1972-1982 - Dold's Lawnmower Sales & Service - country store, gasoline, etc.
1982-1988 - Ridge Country Store - gasoline, country store, grocery, antiques

11942 Falls Road (Building B)

1962-1982 - Scientific Plant Service - sales of replacement trees and plant supplies and materials
1982-1988 - Dold's Lawnmower Sales & Service - shrubs and tree sales (Christmas trees), plant supplies and materials

Mr. Dennis Peddy of Baltimore County is interested in leasing the property at 11942 Falls Road. Mr. Peddy intends to use the property to sell flowers, plants and related materials and supplies. Mr. Peddy plans to also sell in December of each year, Christmas trees for a two to three week period. Therefore, the use of the Property by Mr. Peddy is a continuance of the existing non-conforming use. Mr. Peddy intends to improve the appearance of the existing building located on the property located at 11942 Falls Road.

The uses of the Property are so encompassing that Mr. Peddy's intended use of the property at 11942 Falls Road is already covered under the existing permitted uses. However, since Mr. Peddy desires to spend monies to improve the existing building, he needs assurance of the continuance of the non-conforming use. Mr. Peddy is therefore requesting that the Zoning Commissioner certify the continuance of a non-conforming use of the Property.

Mr. Robert Dold and Mr. Dennis Peddy respectfully request that the Zoning Commissioner find that the intended use

of 11942 Falls Road by Mr. Peddy is in compliance with the Baltimore County zoning regulations since it is a continuation of a non-conforming use. No substantial public health, safety or general welfare violations would result in granting the request. In fact, granting the request would improve the appearance of the Property and the surrounding area.

Attached hereto and made a part hereof, is a description of the Property as prepared by Gerhold, Cross & Etzel, Surveyors, and a plat of the Property as prepared by said surveyors.

SIBL4018(wp)
092788

#1654

PHILIP K. CROSS
JOHN F. ETZEL
WILLIAM G. ULRICH
GORDON T. LANGDON
DAVID E. RANSONE

GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
412 DELAWARE AVENUE
TOWSON, MARYLAND 21204
823-4470

EMERITUS
PAUL G. DOLLENBERG
FRED H. DOLLENBERG
CARL L. GERHOLD

September 16, 1988

Zoning Description

All that piece or parcel of land situate, lying and being in the Eighth Election District of Baltimore County, State of Maryland and described as follows to wit:

Beginning for the same at a point in the center of Falls Road distant 2200 feet measured northwesterly along the center of Falls Road from the intersection of the center lines of Falls Road and Broadway Road and running thence and binding along the center of Falls Road, the three following courses and distances viz: North 6 degrees 38 minutes West 127.53 feet, North 20 degrees 34 minutes West 61.33 feet and North 31 degrees 22 minutes 38 seconds West 134.10 feet, thence leaving said Falls Road and binding on the outlines of the property of the petitioners herein, the four following courses and distances viz: South 76 degrees 22 minutes West 205.50 feet, South 29 degrees 23 minutes East 163.40 feet, South 11 degrees 57 minutes East 28.11 feet and South 14 degrees 08 minutes East 155.00 feet and thence, North 68 degrees 57 minutes East 194.98 feet to the place of beginning.

Containing 1.5 Acres of land more or less.

Being the property of the petitioners herein and shown on a plat filed with the Baltimore County Zoning Department.

STATE OF MARYLAND
JOHN FRANCIS ETZEL
No. 2682
REGISTERED
LAND SURVEYOR

EXHIBIT B

IN RE: PETITION FOR SPECIAL HEARING
WS Falls Road, 2200' NW
Broadway Road
(11943 & 11950 Falls Road)
3rd Councilmanic District
8th Election District
Legal Owner: Robert Dold,
Contract Purchaser:
Dennis Peddy

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* CASE # 89-204 SPH
*

****

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses; namely, Barbara Jung, Mr. Louis J. Pucci, Mr.and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales,

Date 11/15/89 By [illegible]

ORDER RECEIVED FOR FILING

There are retail sales of General Hardware, Grocery items and a Deli operation. For the building known as building "C" on Petitioner's Exhibit 1, there is a request for a nonconforming use for Tree and Plant Sales operation and a Lawn and Garden Supply business.

The proper review of a case for a nonconforming use is basically a factual review overlaid on to a legal background. If the facts fulfill all of the required standards, then the relief requested should be granted.

The testimony and evidence tend to establish the following facts about the subject property. The site in question has been zoned residential since the first zoning in 1945. None of the residential zoning classifications has ever permitted the type of commercial activity that exist on the site. The property was originally used for a commercial purpose in 1915. There was a commercial establishment loosely described as a Feed and Grocery Store which became a Country Store or General Store over the years.

The issue, of course, is not names, but uses or activities. The evidence seems to prove that the retail sales have tended to include food and grocery products. Some gasoline sales and small household products have always been part of the commercial operations. The Farm, Feed Store and Outdoor Supplies which are now referred to as lawn and garden supplies have changed in type over the years, but the use appears continuous. The Plant sales and Christmas Tree sales are nothing more than a seasonal part of the Feed Store or Lawn and Garden operations.

Of all the witnesses, Mr. Griffin was the person with the longest clear memories of this site. He testified that the basic operation has remained unchanged for many years. He regularly visited the property during the early 1940s and has been a regular customer ever since.

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Date 11/15/91
By Lin Barker

The other witnesses testified to the same basic facts, however, the period of time they covered is shorter then Mr. Griffin. There is no evidence in the record that the business has ever lapsed for more than one year, nor is there any evidence that the basic operation has changed dramatically.

Zoning came officially to Baltimore County on January 2, 1945, when, pursuant to previous authorization by the General Assembly, the County Commissioners adopted a comprehensive set of zoning regulations.

The Commissioners were first authorized to adopt comprehensive planning and zoning regulations in 1939 (Laws of Maryland, 1939, ch. 715). At the next biennial session of the General Assembly, this authorization was repealed, and a new authorization was enacted (Laws of Md., 1941, ch. 247). Before any such regulations were issued, the Legislature authorized the Commissioners to make special exceptions to the regulations (Laws of Md., 1943, ch. 877). The first regulations were adopted and took effect on January 2, 1945. See Kahl v. Cons. Gas Elec. Light and Pwr. Co., 191 Md. 249, 254, 60 A.2d 754 (1948); Calhoun v. County Board of Appeals, 262 Md. 265, 277 A.2d 589 (1971).

Section II of those regulations created seven zones, four being residential, one commercial, and two industrial. See McKemy v. Baltimore County, Md., 39 Md. App. 257, 385 A.2d 96 (1978).

Those original regulations provided for nonconforming uses. The statute read as follows:

> "A lawful nonconforming use existing on the effective date of the adoption of these regulations may continue, provided, however, upon any change from such nonconforming use to a conforming use, or any attempt to change from such nonconforming use to a different nonconforming use or any discontinuance of such nonconforming use for a period of one year, or in case a nonconforming struc-

ORDER RECEIVED FOR FILING
Date 11/30/81
By J. Hoyle

ture shall be damaged by fire or otherwise to the extent of seventy-five (75%) percent of its value, the right to continue to resume such nonconforming use shall terminate, provided, however, that any such lawful nonconforming use may be extended or enlarged to an extent not more than once again the area of the land used in the original nonconforming use." Section XI, 1945, B.C.Z.R.

Baltimore County adopted a new set of comprehensive zoning regulations on March 30, 1955. The issue of nonconforming uses are dealt with in Section 104 of those regulations. The Section then read:

"104.1 - A lawful nonconforming use existing on the effective date of the adoption of these regulations may continue; 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, or in case any nonconforming business or manufacturing structure shall be damaged by fire or other casualty to the extent of seventy-five (75%) percent of its replacement cost at the time of such loss, the right to continue or resume such nonconforming use shall terminate. No nonconforming building or structure and no nonconforming use of a building, structure, or parcel of land shall hereafter be extended more than 25% of the ground floor area of buildings so used."

Section 104.1 was changed to its current language on March 15, 1976 by Bill No. 18-76. The current effective regulation reads as follows:

"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, or in case any nonconforming business or manufacturing structure shall be damaged by fire or other casualty to the extent of seventy-five (75%) percent of its replacement cost at the time of such loss, the right to continue or resume such nonconforming use shall

ORDER RECEIVED FOR FILING
Date
By

> terminate. No nonconforming building or structure and no nonconforming use of a building, structure, or parcel of land shall hereafter be extended more than 25% of the ground floor area of buildings so used. (B.C.Z.R., 1955; Bill No. 18, 1976)"

On August 4, 1980, the current language found in Section 104.2 was added to the B.C.Z.R. by Bill No. 167-80. This regulation placed an exception upon the general nonconforming rule for Special Exception office buildings. The second reads as follows:

> "Exception. Any contrary provision of these regulations notwithstanding, an office building that was authorized by grant of a special exception and that becomes damaged to any extent or destroyed by casualty may be fully restored in accordance with the terms of the special exception. (Bill No. 167, 1980)"

As with all nonconforming use cases, the first task is to determine what lawful nonconforming use existed on the subject property prior to January 2, 1945, the effective date of the adoption of the Zoning Regulations and the controlling date for the beginning of zoning.

Clearly, the uses testified to above have existed since prior to January 2, 1945. The exact types of uses to be declared nonconforming will be developed below as part of the Order.

The second principle to be applied, as specified in Section 104.1, is whether or not there has been a change in the use of the subject property. A determination must be made as to whether or not the change is a different use, and therefore, breaks the continued nature of the non-conforming use. If the change in use is found to be different than the original use, the current use of the property shall not be considered nonconforming. See McKemy v. Baltimore County, Md., 39 Md. App.257, 385 A2d. 96 (1978).

ORDER RECEIVED FOR FILING
Date 11/25/81
By Zoning

ORDER RECEIVED FOR FILING

As stated in the findings of fact above, the uses seem to have continued since 1945. The basic use appears to have remained unchanged and the Country Store or General Store shall remain.

When the claimed nonconforming use has changed, or expanded, then the Zoning Commissioner must determine whether or not the current use represents a permissible intensification of the original use or an actual change from the prior legal use. In order to decide whether or not the current activity is within the scope of the nonconforming use, the Zoning Commissioner should consider the following factors:

> "(a) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;
>
> (b) Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature, and kind;
>
> (c) Does the current use have a substantially different effect upon the neighborhood;
>
> (d) Is the current use a "drastic enlargement or extension" of the original nonconforming use."

RECEIVED FOR FILING
Date 11/30/81
By Mary Rose

Clearly, there have been changes in the use of the site. The basic operation has remained the same, however, the services have been added to and altered somewhat over the years. The lawn mower sales and services is a change, however, it is also a mere intensification of the Farm and/or Feed Store which grew into the Lawn and Garden Supply operation.

There has been a refinement in the sense that plant sales and the Christmas tree sales are seen as accessory activities. These

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accessory activities are an outgrowth of the Lawn and Garden Supply operation. The hardware, deli and gasoline sales have been present on site since prior to January 7, 1945 or have not expanded in the nature of or scope of operations.

There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site.

Building "C" is and will remain a storage building. No retail operations may be established therein. There will be no increase in the parking area and the nature growth areas will not be removed or reduced in size or area.

After due consideration of the testimony and evidence presented, it is clear the nonconforming use for the subject site should be granted.

Pursuant to the advertisement, posting of the property, and the public hearing on this Petition held and for the reasons set forth above, the request for a Special Hearing should be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 30th day of November 1988 that the Petition for Special Hearing to approve a nonconforming use for a Country Store, with Food and Grocery sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, not including contractors or

ORDER RECEIVED FOR FILING
Date 11/30/88
By JJ Wilson

construction companies, landscaping or trucking operation or an automobile service garage, as indicated on Petitioner's Exhibit 1, which shall become the final development plan and final site plan, be and the same is hereby GRANTED.

J. Robert Haines

J. ROBERT HAINES
ZONING COMMISSIONER OF
BALTIMORE COUNTY

JRH:mmn

cc: Peoples Counsel
Steven I. Batoff, Esquire
Mr. Dennis Peddy
Ms. Bargara Jung
Mr. Louis Pucci
Ms. Geraldine McKnight
Mr. and Mrs. Robert Dold
Ms. Betty Prince
Ms. Joanne Roberts
Mr. and Mrs. Griffin
Mr. Robert J. Hoffman

CERTIFIED FOR FILING
Date
By

EXHIBIT C

James Hammond
1517 Applecroft Way
Cockeysville, MD 21230
Telephone: 410-252-0782

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

RE: Recertification / Clarification of Non-Conforming Use (SPH #89-204)

Property Owner: Mr. And Mrs. Robert E. Dold
Property Location: 11948 Falls Road, Cockeysville, MD 21030
Identification: Tax Map 50, Grid 24, Parcels 267 and 297

Dear Mr. Jablon,

As directed by your office, I am submitting this Letter of Spirit and Intent in order to clarify and re-establish the non-conforming use certification of the above referenced property. I am currently working with the property owner in a transaction involving the property.

The rear 900sf building was formerly approved and used for a lawn mower sales and service operation. Subsequently, the building has been used as a gift shop. I propose to reestablish the lawn mower sales and service operation and continue the additional uses listed below. I would also like assurance that, in the event the building is destroyed, the improvements may be rebuilt.

On April 6, 2001, I reviewed the Decision and Order rendered for the Special Hearing (SPH 89-204) and consulted with the planners on duty that day. Based on the information provided, it is my understanding that the following uses are permitted on the site in perpetuity, i.e., that there are no time limitations or restrictions on the continuation of the uses as approved by the Decision and Order:

1] Lawn mower sales and service
2] Plant and tree sales and Christmas tree sales
3] Gasoline sales
4] Deli / convenience store
5] Gift shop

I request from your office a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses. Also, please provide a discussion of the owner's property rights in the event of destruction of the improvements as well as the proper procedure for rebuilding following such an unlikely event.

Your immediate attention to this matter would be greatly appreciated. I have attached a copy of the Decision and Order as well as the site plan submitted during the special hearing process. Thank you for your assistance.

Sincerely,

James Hammond
Telephone: 410-252-0782

Baltimore County
Department of Permits and
Development Management

Permits and Licenses
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3900
Fax: (410) 887-2824

April 20, 2001

EXHIBIT D

Mr. James Hammond
1517 Applecroft Way
Cockeysville, MD 21030

Dear Mr. Hammond,

RE: Zoning Verification Letter, 11948 Falls Rd.
Cockeysville, MD 21030, 8th Election District

Your letter to Mr. Arnold Jablon, Director of Permits and Development Management, has been referred to me for reply. Based upon the information provided therein and our research of the zoning records, the following has been determined.

The above referenced property is currently zoned RC 4 (Watershed Protection) as per Baltimore County Zoning Map # NW 15D. Included with this response is a copy of a portion of said map

Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, *country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales, and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses.

Pursuant to Section 104.2 of the BCZR, which addresses non-conforming uses, a structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged.

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

Sincerely,

Lloyd T. Moxley
Planner II, Zoning Review

LTM:ltm

Printed with Soybean Ink
on Recycled Paper

James G. Hammond 03-366-SPH
11942 & 11950 Falls Rd., Cockeys 21030

03-366-SPH

6/25/2003 @ 10:00 am
8/26/03 @ 9:30 am Deliberation
11/05/03 @ 9:30 am - Motion Hearing

2/28/2006 @ 10 am
ON REMAND (CSA)
5/02/06 @ 9:00 a.m. Delib.
6/11/09 @ 9:30 am. Deliberation

October 17, 2003
November 6, 2003

03-366-SPH

20030366 "A"
supplemental

September 28, 2006
October 2, 2009

(3)

JAMES HAMMOND
11942 & 11950 FALLS RD
03-366-SPH
FILE 1 OF 3

2/10/06 - Docket entries ✓

03-366-SPH

Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at 11942 & 11950 Falls Road
which is presently zoned RC-4

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 clarification that lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site and to amend the prior orders in Case #89-204-SPH and 94-14-SPH, if necessary.

Property is to be posted and advertised as prescribed by the zoning regulations. B.C.O.
I, or we, agree to pay expenses of above Special Hearing, advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

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

Contract Purchaser/Lessee:

Name - Type or Print

Signature

Address Telephone No.

City State Zip Code

Legal Owner(s):

James G Hammond
Name - Type or Print

Signature

Name - Type or Print

Signature

1517 Applecroft Lane 410-308-0022
Address Telephone No.

Cockeysville, Md. 21030
City State Zip Code

Attorney For Petitioner:

John C Murphy
Name - Type or Print

Signature

John C Murphy
Company

516 N. Charles St. 410-685-4888
Address Telephone No.

Baltimore Md. 21201
City State Zip Code

Representative to be Contacted:

John C Murphy, Esq.
Name

516 N Charles St. 410-685-4888
Address Telephone No.

Baltimore Md. 21201
City State Zip Code

ORDER RECEIVED FOR FILING
Date 4/16/03
By B

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING _____

UNAVAILABLE FOR HEARING _____

Case No. 03-366-SPH

Reviewed By JNP Date 2/10/03

REV 9/15/98

GORDON T. LANGDON
DENNIS M. MILLER
EDWARD F. DEIACO-LOHR
BRUCE E. DOAK

GERHOLD, CROSS & ETZEL
Registered Professional Land Surveyors
SUITE 100
320 EAST TOWSONTOWN BOULEVARD
TOWSON, MARYLAND 21286-5318

410-823-4470
FAX 410-823-4473

EMERITUS
PAUL G. DOLLENBERG
FRED H. DOLLENBERG
CARL L. GERHOLD
PHILIP K. CROSS
OF COUNSEL
JOHN F. ETZEL
WILLIAM G. ULRICH

ZONING DESCRIPTION

All that piece or parcel of land situate, lying and being in the Eighth Election District of Baltimore County, State of Maryland and described as follows to wit:

Beginning for the same at a point in the center of Falls Road distant 2200 feet measured northwesterly along the center of Falls Road from the intersection of the center lines of Falls Road and Broadway Road and running thence and binding along the center of Falls Road, the three following courses and distances viz: North 6 degrees 38 minutes West 127.53 feet, North 20 degrees 34 minutes West 61.33 feet and North 31 degrees 22 minutes 38 seconds West 134.10 feet, thence leaving said Falls Road and binding on the outlines of the property of the petitioners herein, the four following courses and distances viz: South 76 degrees 22 minutes West 205.50 feet, South 29 degrees 23 minutes East 163.40 feet, South 11 degrees 57 minutes East 28.11 feet and South 14 degrees 08 minutes East 155.00 feet and thence, North 68 degrees 57 minutes East 194.98 feet to the place of beginning.

Containing 1.5 Acres of land, more or less.

Being the property of the petitioners herein and shown on a plat filed with the Baltimore County Zoning Department.



2/6/03

03-366-SPH

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 22266

DATE 4/17/03 ACCOUNT 001-006-6150

AMOUNT $ 300.00

RECEIVED FROM: John C. Murphy

FOR: Appeal

03-366-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER

CASHIER'S VALIDATION

PAID RECEIPT

BUSINESS	ACTUAL	TIME	DRW
4/17/2003	4/17/2003	14:35:00	2

REG W80A WALKIN DEDL DMD
RECEIPT # 223709 4/17/2003 DFLN
DEP 5 520 ZONING VERIFICATION
CK NO. 022266
Rcpt Tot $300.00
300.00 CK .00 CA
Baltimore County, Maryland

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 21015

DATE 2/10/03 ACCOUNT A-001-006-6150

AMOUNT $ 325.00

RECEIVED FROM: James G. Hammond

FOR: 11942 & 11950 FALLS ROAD

03-366-SPH

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER

CASHIER'S VALIDATION

PAID RECEIPT
BUSINESS ACTUAL TIME
2/10/2003 2/10/2003 09:34:41
MI Mstr Unit/SR Dept Dept Drawer 2
RECEIPT # 21912 2/10/2003 OFLN
Dept 5 528 ZONING VERIFICATION
CK NO. 02015
Rcpt Tot $325.00
325.00 CK .00 CA
Baltimore County, Maryland

Can not do Hearing
March 03-30

03-366-SPH

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (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.

For Newspaper Advertising:

Item Number or Case Number: 03-366-SPH

Petitioner: James G. Hammond

Address or Location: 11942 + 11950 Falls Road

PLEASE FORWARD ADVERTISING BILL TO:

Name: John C. Murphy, Esq.

Address: 516 N. Charles St. Suite 406
Baltimore, Md. 21201

Telephone Number: 410-685-4888

Revised 2/20/98 - SCJ

TO: PATUXENT PUBLISHING COMPANY
Tuesday, March 4, 2003 Issue - Jeffersonian

Please forward billing to:
John C. Murphy
516 N. Charles Street
Baltimore, MD 21201

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: 03-366-SPH
11942 & 11950 Falls Road
W/side of Falls Road 2,200 feet north of Broadway Road
8th Election District – 3rd Councilmanic District
Legal Owner: James G. Hammond

Special Hearing to permit lawn and garden equipment sales and service not limited to products sold on site and to amend the prior orders in Case Nos. 89-204-SPH and 94-14-SPH if necessary.

Hearings: Thursday, March 20, 2003 at 9:00 a.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 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.

Baltimore County
Department of Permits and
Development Management

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

April 18, 2003

Mr. James G. Hammond
1517 Applecraft Lane
Cockeysville, MD 21030

Dear Mr. Hammond:

RE: Case No. 03-366-SPH, 11942 & 11950 Falls Road

Please be advised that an appeal of the above-referenced case was filed in this office on April 17, 2003 on your behalf by John C. Murphy, Esquire. 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
Director

AJ:rlh

c: Timothy M. Kotroco, Deputy Zoning Commissioner
Arnold Jablon, Director of PDM
People's Counsel
John C. Murphy, 516 N. Charles Street, Baltimore 21201

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on Recycled Paper

Law Offices
John C. Murphy
516 N. Charles Street, Suite 206
Baltimore, Md. 21201
jcmurphy@bellatlantic.net

John C. Murphy
John Cannan

410-625-4828
443-956-8711
Fax 410-625-0273

April 17, 2003

Mr. Arnold Jablon
Director
Baltimore County Department of Permits and
Development Management
County Office Building
111 W. Chesapeake Avenue Room 111
Towson, Maryland, 21204

Re: Appeal of Case No. 03-366-SPH
Denial of Special Hearing

Dear Mr. Jablon:

Please consider this notice of an appeal by Mr. James G. Hammond of the following case heard before the Deputy Zoning Commissioner of Baltimore County:

In Re: Petition for Variance
W/S of Falls Road, 2,200' N of Broadway Road
8th Election District
3rd Councilmanic District
(11942 & 11950 Falls Road)
James G. Hammond, Petitioner
Case Number: 03-366-SPH

This decision was issued on April 11, 2003. It denied the petitioner's request for a special hearing. A check for $300 for the $225 appeal fee and $75 sign fee is enclosed.

If you have any questions, please free to contact me.

Sincerely,

John C. Murphy

cc: Mr. James G. Hammond

APPEAL

Petition for Special Hearing
11942 & 11950 Falls Road
W/side of Falls Road 2,200 feet north of Broadway Road
8th ED – 3rd CD
Legal Owner: James G. Hammond

Case No.: 03-366-SPH

Petition for Variance (February 10, 2003)

Zoning Description of Property

Notice of Zoning Hearing (February 20, 2003)

Certification of Publication (March 4, 2003)

Certificate of Posting (posted by Bruce Doak) on March 6, 2003

Entry of Appearance by People's Counsel (February 28, 2003)

Petitioner(s) Sign-In Sheet
One Sheet

Protestant(s) Sign-In Sheet
None

Citizen(s) Sign-In Sheet
One Sheet

Zoning Advisory Committee Comments

Petitioners' Exhibits:
1. Plat to accompany a Petition for a Special Hearing and letter of Spirit and Intent from Mr. Hammond
2. April 20, 2001 letter from Lloyd Moxley to Mr. Hammond
3. Signed Petitions in support of lawn and garden equipment
4. Letter from neighbor of Mr. Hammond
5. Letter from a member of Falls Road Community group
6. Letter to Lloyd Moxley from Mr. Hammond
7. June 11, 2001 letter from Mr. Moxley

Protestants' Exhibits:
1. Resolution of the Falls Road Community Assn. against expansion sought by Mr. Hammond
2. 16 Photos of site

Miscellaneous (Not Marked as Exhibit

Deputy Zoning Commissioner's Order (April 11, 2003 - DENIED)

Notice of Appeal received on April 17, 2003 from John Murphy on behalf of
Mr. James Hammond

c: People's Counsel of Baltimore County, MS #2010
Deputy Zoning Commissioner
Arnold Jablon, Director of PDM
John C. Murphy

date sent April 18, 2003 rlh

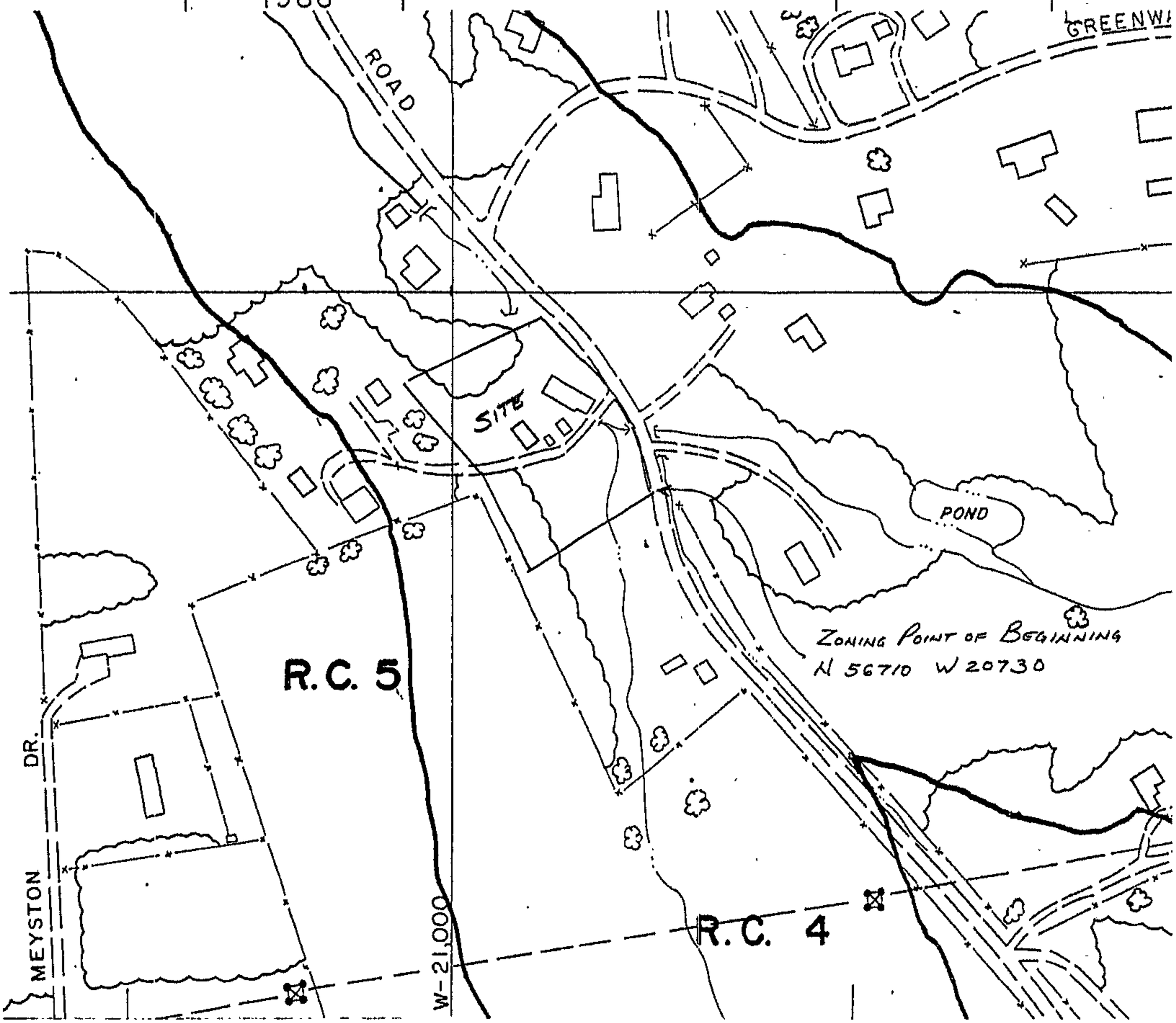
1" = 200'±

DATE OF PHOTOGRAPHY JANUARY 1986

NORTHWEST OF BALTIMORE COUNTY CLUB

N.W.

15-D



2000 COMPREHENSIVE ZONING MAP
ADOPTED by
THE BALTIMORE COUNTY COUNCIL
OCTOBER 10, 2000
Bills Nos. 87-00, 88-00, 89-00, 90-00, 91-00, 92-00, 93-00,

Chairman, County Council

03-366-SPH

James Hammond
1517 Applecroft Way
Cockeysville, MD 21230
Telephone: 410-252-0782

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

RE: Recertification / Clarification of Non-Conforming Use (SPH #89-204)

Property Owner: Mr. And Mrs. Robert E. Dold
Property Location: 11948 Falls Road, Cockeysville, MD 21030
Identification: Tax Map 50, Grid 24, Parcels 267 and 297

Dear Mr. Jablon,

As directed by your office, I am submitting this Letter of Spirit and Intent in order to clarify and re-establish the non-conforming use certification of the above referenced property. I am currently working with the property owner in a transaction involving the property.

The rear 900sf building was formerly approved and used for a lawn mower sales and service operation. Subsequently, the building has been used as a gift shop. I propose to reestablish the lawn mower sales and service operation and continue the additional uses listed below. I would also like assurance that, in the event the building is destroyed, the improvements may be rebuilt.

On April 6, 2001, I reviewed the Decision and Order rendered for the Special Hearing (SPH 89-204) and consulted with the planners on duty that day. Based on the information provided, it is my understanding that the following uses are permitted on the site in perpetuity, i.e., that there are no time limitations or restrictions on the continuation of the uses as approved by the Decision and Order:

1] Lawn mower sales and service
2] Plant and tree sales and Christmas tree sales
3] Gasoline sales
4] Deli / convenience store
5] Gift shop

I request from your office a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses. Also, please provide a discussion of the owner's property rights in the event of destruction of the improvements as well as the proper procedure for rebuilding following such an unlikely event.

Your immediate attention to this matter would be greatly appreciated. I have attached a copy of the Decision and Order as well as the site plan submitted during the special hearing process. Thank you for your assistance.

Sincerely,

James Hammond
Telephone: 410-252-0782

Pet Ex #1

RESOLUTION

WHEREAS James G. Hammond has requested a Special Hearing (Case No. 03-366-SPH) to expand his non-conforming use at 11942 and 11950 Falls Road, Baltimore County, to include lawn and garden equipment sales and service not limited to products sold on site and to amend the prior orders in Case Nos. 89-204-SPH and 94-14-SPH,

WHEREAS the Falls Road Community Association is committed to preserving the rural and residential character of the Falls Road corridor and is very concerned about the negative effect of such an expanded non-conforming use on its members, the community, and the environment,

NOW, THEREFORE,

We, the Falls Road Community Association, acting through our Board of Directors, hereby RESOLVES TO OPPOSE any expansion of said non-conforming use, and any amendment of said prior orders.

3/13/03
Date

John A. Galbreath
President, Falls Road Community Association

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: #03-366-SPH
11942 & 11950 Falls Road
W/side of Falls Road 2,200 feet north of Broadway Road
8th Election District - 3rd Councilmanic District
Legal Owner(s): James G. Hammond

Special Hearing: to permit lawn and garden equipment sales and service not limited to products sold on site and to amend the prior orders in Case Nos. 89-204-SPH and 94-14-SPH if necessary.

Hearing: Thursday, March 20, 2003 at 9:00 a.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) 887-4386.

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

JT 3/604 March 4 C590576

CERTIFICATE OF PUBLICATION

3/6/, 2003

THIS IS TO CERTIFY, that the annexed advertisement was published in the following weekly newspaper published in Baltimore County, Md., once in each of 1 successive weeks, the first publication appearing on 3/4/, 2003.

- [X] The Jeffersonian
- [ ] Arbutus Times
- [ ] Catonsville Times
- [ ] Towson Times
- [ ] Owings Mills Times
- [ ] NE Booster/Reporter
- [ ] North County News

S. Wilkinson

LEGAL ADVERTISING

Gerhold, Cross & Etzel, Ltd.
Registered Professional Land Surveyors • Established 1906

Suite 100 • 320 East Towsontown Boulevard • Towson, Maryland 21286
Phone: (410) 823-4470 • Fax: (410) 823-4473 • www.gcelimited.com

CERTIFICATE OF POSTING

RE: CASE #03-366-SPH
PETITIONER/DEVELOPER:
James G. Hammond
DATE OF HEARING:
March 20, 2003

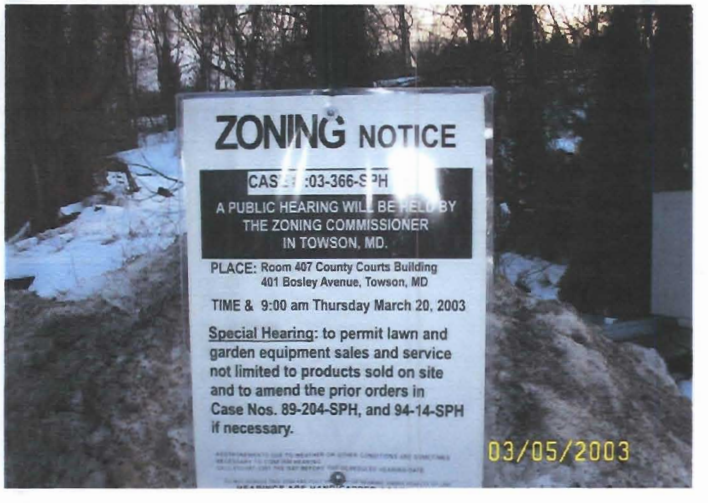
BALTIMORE COUNTY DEPARTMENT OF
PERMITS AND DEVELOPMENT MANAGEMENT
COUNTY OFFICE BUILDING, ROOM 111
111 WEST CHESAPEAKE AVE.
TOWSON, MARYLAND 21204

ATTENTION: REBECCA HART

LADIES AND GENTLEMEN:

THIS LETTER IS TO CERTIFY UNDER THE PENALTIES OF PERJURY THAT THE NECESSARY SIGN(S) REQUIRED BY LAW WERE POSTED CONSPICUOUSLY ON THE PROPERTY LOCATED AT

LOCATION:
11942 & 11950 Falls Road



POSTED ON: March 4, 2003

DATE:
March 6, 2003

Bruce E. Doak

SIGNATURE OF SIGN POSTER

BRUCE DOAK

GERHOLD, CROSS & ETZEL, LTD
SUITE 100
320EAST TOWSONTOWN BLVD
TOWSON, MARYLAND 21286
410-823-4470 PHONE
410-823-4473 FAX

18 A10

APPEAL SIGN POSTING REQUEST

CASE NO.: 03-366-SPH

James G. Hammond - LEGAL OWNERS

11942 and 11950 Falls Road

8th ELECTION DISTRICT APPEALED: 4/17/2003

ATTACHMENT – (Plan to accompany Petitioner's Exhibit No.1)

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

CERTIFICATE OF POSTING

TO: Baltimore County Board of Appeals
400 Washington Avenue, Room 49
Towson, Maryland 21204

Attention: Kathleen Bianco
Administrator

RE: Case No.: 03-366 SPH

Petitioner/Developer:

This is to certify that the necessary appeal sign was posted conspicuously on the property located at: 11942 & 11950 FALLS RD.

The sign was posted on 5/15, 2003

By: Gary C Freund
(Signature of Sign Poster)

GARY FREUND
(Printed Name)

TO: PATUXENT PUBLISHING COMPANY
Tuesday, March 4, 2003 Issue - Jeffersonian

Please forward billing to:
John C. Murphy
516 N. Charles Street
Baltimore, MD 21201

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: 03-366-SPH
11942 & 11950 Falls Road
W/side of Falls Road 2,200 feet north of Broadway Road
8th Election District – 3rd Councilmanic District
Legal Owner: James G. Hammond

Special Hearing to permit lawn and garden equipment sales and service not limited to products sold on site and to amend the prior orders in Case Nos. 89-204-SPH and 94-14-SPH if necessary.

Hearings: Thursday, March 20, 2003 at 9:00 a.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 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.

Baltimore County
Department of Permits and
Development Management

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

February 20, 2003

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: 03-366-SPH
11942 & 11950 Falls Road
W/side of Falls Road 2,200 feet north of Broadway Road
8th Election District – 3rd Councilmanic District
Legal Owner: James G. Hammond

Special Hearing to permit lawn and garden equipment sales and service not limited to products sold on site and to amend the prior orders in Case Nos. 89-204-SPH and 94-14-SPH if necessary.

Hearings: Thursday, March 20, 2003 at 9:00 a.m. in Room 407 , County Courts Building, 401 Bosley Avenue

Arnold Jablon
Director

AJ:rlh

C: John C. Murphy, 516 N. Charles Street, Baltimore 21201
James G. Hammond, 1517 Applecraft Lane, Cockeysville 21030

NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY WEDNESDAY, MARCH 5, 2003.**
(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.

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on Recycled Paper

County Board of Appeals of Baltimore County

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

June 2, 2003

NOTICE OF ASSIGNMENT

CASE #: 03-366-SPH

IN THE MATTER OF: ***James G. Hammond -Petitioner***
11942 and 11950 Falls Road
8th Election District; 3rd Councilmanic District

4/11/03 – Order of D.Z.C. in which requested special hearing relief was DENIED.

ASSIGNED FOR: **WEDNESDAY, JUNE 25, 2003 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: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Director, Department of Permits & Development Management

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County Board of Appeals of Baltimore County

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

July 1, 2003

NOTICE OF DELIBERATION

IN THE MATTER OF:

JAMES G. HAMMOND – Legal Owner
Case No. 03-366-SPH

Having heard this matter on 6/25/03, public deliberation has been scheduled for the following date /time:

DATE AND TIME : **TUESDAY, AUGUST 26, 2003 at 9:30 a.m.**

LOCATION : **Hearing Room 48, Basement, Old Courthouse**

NOTE: Closing briefs are due on Monday, July 28, 2003
Original for file plus three (3) additional copies.

Kathleen C. Bianco
Administrator

c: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Director, Department of Permits & Development Management

FYI copy: 2-3-5

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County Board of Appeals of Baltimore County

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

October 22, 2003

NOTICE OF ASSIGNMENT – Motion Only Hearing

CASE #: 03-366-SPH

IN THE MATTER OF: ***James G. Hammond -Petitioner***
11942 and 11950 Falls Road
8th Election District; 3rd Councilmanic District

10/17/03 – Board of Appeals Order – Petition for Special Hearing DENIED.

Pursuant to Rule 10 of the Board's *Rules of Practice and Procedure*, a date and time has been assigned for the purpose of receiving argument on Petitioner's Motion for Rehearing within 30 days from the date of issuance of the Board's Order in this matter; and has been

ASSIGNED FOR: **WEDNESDAY, NOVEMBER 5, 2003 at 9:30 a.m.**

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

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: Counsel for Appellant/Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Timothy M. Kotroco, Director /PDM

FYI: 2-3-5

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County Board of Appeals of Baltimore County

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

January 31, 2006

NOTICE OF ASSIGNMENT
ON REMAND FROM CIRCUIT COURT
PURSUANT TO ORDER OF THE COURT OF SPECIAL APPEALS

CASE #: 03-366-SPH **IN THE MATTER OF:** ***James G. Hammond -Petitioner***
11942 and 11950 Falls Road 8th E; 3rd C

1/26/06 – Order of the Circuit Court for Baltimore County remanding this matter to the Board of Appeals pursuant to the 11/15/05 Order of the Court of Special Appeals.

This matter, which was remanded from the Circuit Court by Order of the Court of Special Appeals and assigned for hearing in accordance with that Order, has been scheduled for **ARGUMENT ONLY limited to the issues on remand** pursuant to the Opinion of the Court of Special Appeals (written Memoranda to be filed on an agreed date to be determined on the date of hearing); and has been

ASSIGNED FOR: **TUESDAY, FEBRUARY 28, 2006 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 B, 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: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

Office of People's Counsel
Pat Keller, Planning Director
William J. Wiseman III, Zoning Commissioner
Timothy M. Kotroco, Director /PDM

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County Board of Appeals of Baltimore County

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

February 6, 2006

Ms. Barbara Jung
11939 Falls Road
Cockeysville, MD 21030

FILE

RE: *In the Matter of: James G. Hammond*
Case No. 03-366-SPH

Dear Ms. Jung:

In response to your letter dated February 3, 2006, enclosed is a copy of the Notice of Assignment in the subject matter that was sent to you at 11939 Falls Road, Cockeysville, MD 212030 on January 31, 2006.

I have verified that the address we have on file for you is correct; however, to be sure that you do receive appropriate notice, I've enclosed this second copy for your records and information.

Should you have any further questions, please call me at 410-887-3180.

Very truly yours,

Kathleen C. Bianco
Administrator

Enclosure

c: John C. Murphy, Esquire

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County Board of Appeals of Baltimore County

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

March 1, 2006

NOTICE OF DELIBERATION

IN THE MATTER OF:

JAMES G. HAMMOND – Legal Owner
Case No. 03-366-SPH

Having received argument in this matter on remand from the Circuit Court pursuant to the Order of the Court of Special Appeals on 2/28/06, public deliberation has been scheduled for the following date /time:

DATE AND TIME : **TUESDAY, MAY 2, 2006 at 9:00 a.m.**

LOCATION : **Hearing Room 48, Basement, Old Courthouse**

NOTE: Closing briefs are due on Thursday, March 30, 2006 (Original for file plus three (3) additional copies)

Kathleen C. Bianco
Administrator

c: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

Office of People's Counsel
Pat Keller, Planning Director
William J. Wiseman III, Zoning Commissioner
Timothy M. Kotroco, Director /PDM

FYI copy: 2-5-7

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County Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

Hearing Room – Room 48
Old Courthouse, 400 Washington Avenue

April 29, 2009

NOTICE OF DELIBERATION

(ON SECOND REMAND FROM CIRCUIT COURT)

CASE #: 03-366-SPH **IN THE MATTER OF:** ***James G. Hammond -Petitioner***
11942 and 11950 Falls Road . 8th E; 3rd C

3/17/07 – Order of the Circuit Court for Baltimore County remanding this matter to the Board of Appeals consistent with the 11/15/05 Order of the Court of Special Appeals.

One Panel Member selected to replace Margaret Brassil Ph.D., who is no longer a member of the Board. Public deliberation has been scheduled for the following:

DATE AND TIME : **THURSDAY , JUNE 11, 2009 at 9:30 a.m.**

LOCATION : **Hearing Room #2, Jefferson Building**
105 W. Chesapeake Avenue, Second Floor
(adjacent to Suite 203)

NOTE: ALL PUBLIC DELIBERATIONS ARE OPEN SESSIONS; HOWEVER, ATTENDANCE IS NOT REQUIRED. A WRITTEN OPINION /ORDER WILL BE ISSUED BY THE BOARD AND A COPY SENT TO ALL PARTIES.

Theresa R. Shelton
Administrator

---

c: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

People's Counsel for Baltimore County
William Wiseman, III, Zoning Commissioner
Timothy Kotroco, Director/PDM
Arnold F. "Pat" Keller, Director/Planning
Nancy West, Assistant County Attorney
Paul Mayhew, Assistant County Attorney
John E. Beverungen, County Attorney

County Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

July 20, 2010

NOTICE OF DELIBERATION

(ON THIRD REMAND FROM CIRCUIT COURT)

CASE #: 03-366-SPH **IN THE MATTER OF: *James G. Hammond -Petitioner***
11942 and 11950 Falls Road 8th E; 3rd C

5/24/10 – Memorandum Opinion and Order issued by Circuit Court for Baltimore County AFFIRMING Board of Appeals decision with regard to Petitioner's vested rights arguments and REVERSING AND REMANDING this matter as to Hammond's estoppel claim.

Public deliberation has been scheduled for the following:

DATE AND TIME: **TUESDAY , AUGUST 17, 2010 at 12:00p.m./Noon**

LOCATION: **Hearing Room #2, Jefferson Building**
105 W. Chesapeake Avenue, Second Floor
(adjacent to Suite 203)

NOTE: ALL PUBLIC DELIBERATIONS ARE OPEN SESSIONS; HOWEVER, ATTENDANCE IS NOT REQUIRED. A WRITTEN OPINION /ORDER WILL BE ISSUED BY THE BOARD AND A COPY SENT TO ALL PARTIES.

Theresa R. Shelton
Administrator

---

c: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

People's Counsel for Baltimore County
William Wiseman, III, Zoning Commissioner
Timothy Kotroco, Director/PDM
Arnold F. "Pat" Keller, Director/Planning
Nancy West, Assistant County Attorney
Paul Mayhew, Assistant County Attorney
John E. Beverungen, County Attorney

Baltimore County
Department of Permits and
Development Management

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

March 14, 2003

John C. Murphy
John C. Murphy, Esq.
516 N. Charles Street
Baltimore, MD 21201

Dear Mr. Murphy:

RE: Case Number: 03-366-SPH, 11942 & 11950 Falls Road

The above referenced petition was accepted for processing by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on February 10, 2003.

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.
Supervisor, Zoning Review

WCR:klm

Enclosures

c: People's Counsel
James G. Hammond, 1517 Applecroft Lane, Cockeysville MD 21030

Printed with Soybean Ink
on Recycled Paper

BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits &
Development Management

DATE: February 27, 2003

FROM: Robert W. Bowling, Supervisor
Bureau of Development Plans
Review

SUBJECT: Zoning Advisory Committee Meeting
For February 24, 2003
Item Nos. 361, 362, 363, 364, 365, 366,
367, 368, 369, 370, and 371

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

RWB:CEN:jrb

cc: File

ZAC-2-24-2003-NO COMMENT ITEMS-02272003

Spi 3/20

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits and
Development Management

DATE: March 17, 2003

FROM: Arnold F. 'Pat' Keller, III
Director, Office of Planning

RECEIVED
MAR 17 2003
ZONING COMMISSIONER

SUBJECT: 11942 & 11950 Falls Road

INFORMATION:

Item Number: 03-366

Petitioner: James Hammond

Zoning: RC 4

Requested Action: Special Hearing

SUMMARY OF RECOMMENDATIONS:

If the petitioner's request is granted, it should be contingent upon the condition that outdoor storage and display of lawn and garden equipment shall be in a secured area that is screened from public view, especially in the light of the fact that Falls Road is designated as a scenic route in the county's Master Plan 2010.

Prepared by: Mark A Cunningham

Section Chief: Lynn Lanham

AFK/LL:MAC:

Robert L. Ehrlich, Jr.
Governor

Michael S. Steele
Lt. Governor

Maryland Department of Planning

Audrey E. Scott
Secretary

Florence E. Burian
Deputy Secretary

February 21, 2003

Ms. Rebecca Hart
Baltimore County Department of Permits and Development Management
County Office Building
111 West Chesapeake Avenue, Room 111
Mail Stop # 1105
Towson MD 21204

Re: **Zoning Advisory Committee Agenda, 02/24/03 re: case numbers 03-361-A, 03-362-SPHA, 03-363-A, 03-364-SPHA, 03-365-SPHXA, 03-366-SPH, 03-367-SPHA, 03-368-A, 03-369-A, 03-370-A, 03-371-SPH**

Dear Ms. Hart:

The Maryland Department of Planning has received the above-referenced information on 02/21/03. The information has been submitted to Mr. Mike Nortrup.

Thank you for your cooperation in this review process. Please contact me at 410.767.4550 or the above noted reviewer if you have any questions.

Sincerely,

James R. Gatto
Manager
Metropolitan Planning
Local Planning Assistance Unit

cc: Mike Nortrup

Baltimore County
Fire Department

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

County Office Building, Room 111
Mail Stop #1105
111 West Chesapeake Avenue
Towson, Maryland 21204

February 14, 2002

ATTENTION: Rebecca Hart

Distribution Meeting of: February 18, 2003

Item No.: 366

Dear Ms. Hart:

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 Baltimore County Fire Prevention Code, the NFPA 1 & 101, 2000 editions, prior to occupancy or beginning of operation.

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

cc: File

Baltimore County
Fire Department

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

County Office Building, Room 111
Mail Stop #1105
111 West Chesapeake Avenue
Towson, Maryland 21204

February 14, 2002

ATTENTION: Rebecca Hart

Distribution Meeting of: February 18, 2003

Item No.: 366

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

cc: File

RE:	PETITION FOR SPECIAL HEARING 11942 & 11950 Falls Rd; Wside Falls Rd; 2,200 ft N Broadway Road 8th Election & 3rd Councilmanic Districts Legal Owner(s): James G. Hammond Petitioner(s)	*	BEFORE THE ZONING COMMISSIONER FOR BALTIMORE COUNTY 03-366-SPH

* * * * * * * * * * * * *

ENTRY OF APPEARANCE

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 2003, a copy of the foregoing Entry of Appearance was mailed to John C. Murphy, 516 N Charles Street, Baltimore, MD 21201, Attorney for Petitioner(s).

Peter Max Zimmerman
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Baltimore County
Department of Permits and
Development Management

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

RECEIVED
APR 18 2003
BALTIMORE COUNTY
BOARD OF APPEALS

April 18, 2003

Mr. James G. Hammond
1517 Applecraft Lane
Cockeysville, MD 21030

Dear Mr. Hammond:

RE: Case No. 03-366-SPH, 11942 & 11950 Falls Road

Please be advised that an appeal of the above-referenced case was filed in this office on April 17, 2003 on your behalf by John C. Murphy, Esquire. 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
Director

AJ:rlh

c: Timothy M. Kotroco, Deputy Zoning Commissioner
Arnold Jablon, Director of PDM
People's Counsel
John C. Murphy, 516 N. Charles Street, Baltimore 21201

Printed with Soybean Ink
on Recycled Paper

APPEAL

Petition for Special Hearing
11942 & 11950 Falls Road
W/side of Falls Road 2,200 feet north of Broadway Road
8th ED – 3rd CD
Legal Owner: James G. Hammond

Case No.: 03-366-SPH

✓ Special Hearing
✓ Petition for ~~Variance~~ (February 10, 2003)

✓ Zoning Description of Property

✓ Notice of Zoning Hearing (February 20, 2003)

✓ Certification of Publication (March 4, 2003)

✓ Certificate of Posting (posted by Bruce Doak) on March 6, 2003

✓ Entry of Appearance by People's Counsel (February 28, 2003)

✓ Petitioner(s) Sign-In Sheet
One Sheet

✓ Protestant(s) Sign-In Sheet
None

✓ Citizen(s) Sign-In Sheet
One Sheet

✓ Zoning Advisory Committee Comments

✓ Petitioners' Exhibits:
- ✓1. Plat to accompany a Petition for a Special Hearing and letter of Spirit and Intent from Mr. Hammond
- ✓2. April 20, 2001 letter from Lloyd Moxley to Mr. Hammond
- ✓3. Signed Petitions in support of lawn and garden equipment
- ✓4. Letter from neighbor of Mr. Hammond
- ✓5. Letter from a member of Falls Road Community group
- ✓6. Letter to Lloyd Moxley from Mr. Hammond
- ✓7. June 11, 2001 letter from Mr. Moxley

✓ Protestants' Exhibits:
- ✓1. Resolution of the Falls Road Community Assn. against expansion sought by Mr. Hammond
- ✓2. 16 Photos of site

✓ Miscellaneous (Not Marked as Exhibit None

✓ Deputy Zoning Commissioner's Order (April 11, 2003 - DENIED)

✱ ✓ Notice of Appeal received on April 17, 2003 from John Murphy on behalf of Mr. James Hammond

c: People's Counsel of Baltimore County, MS #2010
Deputy Zoning Commissioner
Arnold Jablon, Director of PDM
John C. Murphy

✱ James G. Hammond
1517 Applecroft Lane
Cockeysville, MD 21030

JOHN C MURPHY ESQUIRE
516 N CHARLES STREET SUITE 206
BALTIMORE MD 21201
Attn: PN Appl Pet

Barbara Jung
11939 Falls Road
Cockeysville, MD 21030

Kim Detrick
11941 Falls Road
Cockeysville, MD 21030

Ken Sadofsky
11944 Falls Road
Cockeysville, MD 21030

✓E

NOTICE OF CIVIL TRACK ASSIGNMENT AND SCHEDULING ORDER

CIRCUIT COURT FOR BALTIMORE COUNTY
CIVIL ASSIGNMENT OFFICE
COUNTY COURTS BUILDING
401 BOSLEY AVENUE
P.O. BOX 6754
TOWSON, MARYLAND 21285-6754

Board Of Appeals Of Baltimore County
Old Courthouse Room 49
400 Washington Ave
Baltimore MD 21204

Assignment Date: 01/13/04

Case Title: In The Matter of: James G Hammond
Case No: 03-C-03-012458 AE

The above case has been assigned to the EXPEDITED APPEAL TRACK. Should you have any questions concerning your track assignment, please contact: Richard P. Abbott at (410) 887-3233.
You must notify this Coordinator within 15 days of the receipt of this Order as to any conflicts with the following dates:

SCHEDULING ORDER

1. Motions to Dismiss under MD. Rule 2-322(b) are due by..... 01/28/04
2. All Motions (excluding Motions in Limine) are due by..... 03/13/04
3. TRIAL DATE is..... 04/22/04
   Civil Non-Jury Trial; Start Time: 09:30AM; To Be Assigned: 1/2 HOUR ADMINISTRATIVE APPEAL

Honorable John Grason Turnbull II
Judge

Postponement Policy: No postponements of dates under this order will be approved except for undue hardship or emergency situations. All requests for postponement must be submitted in writing with a copy to all counsel/parties involved. All requests for postponement must be approved by the Judge.

Settlement Conference (Room 507): All counsel and their clients MUST attend the settlement conference in person. All insurance representatives MUST attend this conference in person as well. Failure to attend may result in sanctions by the Court. Settlement hearing dates may be continued by Settlement Judges as long as trial dates are not affected. (Call [410] 887-2920 for more information.)

Special Assistance Needs: If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the Americans with Disabilities Act, please contact the Court Administrator's Office at (410) 887-2687 or use the Court's TDD line, (410) 887-3018, or the Voice/TDD M.D. Relay Service, (800) 735-2258.

Voluntary Dismissal: Per Md. Rule 2-506, after an answer or motion for summary judgment is filed, a plaintiff may dismiss an action without leave of court by filing a stipulation of dismissal signed by all parties who have appeared in the action. The stipulation shall be filed with the Clerk's Office. Also, unless otherwise provided by stipulation or order of court, the dismissing party is responsible for all costs of the action.

Court Costs: All court costs MUST be paid on the date of the settlement conference or trial.

cc: Barbara Jung

RECEIVED
JAN 16 2004
BALTIMORE COUNTY
BOARD OF APPEALS

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

RECEIVED
JUN - 1 2010
BALTIMORE COUNTY
BOARD OF APPEALS

05/28/10

Case Number: 03-C-09-013065 AA OTH
Date Filed: 10/28/2009
Status: Closed/Active
Judge Assigned: Souder, Hon. Susan
Location :
CTS Start : 10/28/09 Target : 04/26/11

In The Matter Of James G Hammond

C A S E H I S T O R Y

OTHER REFERENCE NUMBERS

Description	Number
Case Folder ID	C09013065V01

INVOLVED PARTIES

Type	Num	Name(Last,First,Mid,Title)	Addr Str/End	Pty. Disp. / Addr Update	Entered
PET	001	Hammond, James G	Party ID: 1448558	CT DO 05/25/10	10/30/09
		Attorney: 0017563 Murphy, John C 516 N. Charles Street Suite 206 Baltimore, MD 21201 (410)625-4828	Appear: 10/30/2009		10/30/09
ADA	001	Baltimore County Board Of Appeals	Party ID: 1448559	CT DO 05/25/10	10/30/09
		Mail: 105 W Chesapeake Avenue Towson, MD 21204	10/30/09		10/30/09 KAS
		Attorney: 0005744 Demilio, Carole S	Appear: 11/07/2009		11/07/09

People's Counsel For Baltimore County
105 W Chesapeake Avenue
Room 204
Towson, MD 21204
(410)887-2188

0029075 Zimmerman, Peter M — Appear: 11/07/2009 — 11/07/09
People's Counsel For Baltimore County
105 West Chesapeake Ave.
Room 204
Towson, MD 21204
(410)887-2188.

Type	Num	Name(Last,First,Mid,Title)	Addr Str/End	Pty. Disp. / Addr Update	Entered
ITP	001	Baltimore County Maryland	Party ID: 1456607	CT DO 05/25/10	11/21/09
Mail:		400 Washington Avenue Towson, MD 21204	11/21/09		11/21/09 RLM
Attorney:		0018191 Mayhew, Paul McLane Assistant County Attorney Old Courthouse, 2nd Floor 400 Washington Avenue Towson, MD 21204 (410)887-4420	Appear: 11/12/2009		11/21/09

CALENDAR EVENTS

Date	Time	Fac	Event Description	Text	SA	Jdg	Day	Of Notice	User ID
Result			ResultDt By Result Judge	Rec					
01/28/10	09:30A	CR14	Scheduling Conference	Y		SS	01	/01	JLJ
Held/Concluded			04/02/10 E S.Souder	Y					
Stenographer(s): Court Smart									
04/02/10	09:30A	CR14	Civil Non-Jury Trial	Y		SS	01	/01	KGR
Held/Concluded			04/02/10 E S.Souder	Y					
Stenographer(s): Court Smart									

DISPOSITION HISTORY

Disp Date	Disp Code	Description	Stage Code	Description	User	Activity Date
05/25/10	DO	Decree or Order	CT	AFTER TRIAL/HEARING	EMH	05/25/10

JUDGE HISTORY

JUDGE ASSIGNED	Type	Assign Date	Removal RSN	
JCE Ensor, Hon. Judith C.	J	11/18/09	RA	12/08/09
SS Souder, Hon. Susan	J	12/08/09		

DOCUMENT TRACKING

Num/Seq	Description	Filed	Entered	Party	Jdg	Ruling	Closed	User ID
0001000	Petition for Judicial Review	10/28/09	10/30/09	PET001	TBA		05/25/10	KAS EMH
0001001	Response to Petition for Judicial Review	10/30/09	11/07/09	ADA001	TBA		05/25/10	KET EMH
0001002	Answer in Proper Person filed by Barbara Jung	11/05/09	11/14/09	000	TBA		05/25/10	MRS EMH
0001003	Intent to Participate	11/12/09	11/21/09	ITP001	TBA		05/25/10	RLM EMH
0002000	Certificate of Compliance	11/05/09	11/14/09	000	TBA		05/25/10	MRS EMH
0003000	Transcript of Record from Adm Agency *	12/10/09	12/22/09	ADA001	TBA		05/25/10	SAP EMH
0004000	Notice of Transcript of Record Sent	12/22/09	12/22/09	ADA001	TBA		12/22/09	SAP
0005000	Notice of Transcript of Record Sent	12/22/09	12/22/09	ITP001	TBA		12/22/09	SAP
0006000	Notice of Transcript of Record Sent	12/22/09	12/22/09	PET001	TBA		12/22/09	SAP
0007000	Memorandum of Appeal	02/03/10	03/08/10	PET001	TBA		03/08/10	KTW
0008000	Memorandum of Appeal of Barbara Jung, Pro Se	03/03/10	03/23/10	000	TBA		03/23/10	LAC
0009000	People's Counsel for Baltimore County's Memorandum *	03/04/10	03/23/10	ADA001	TBA		03/23/10	RLM RLM
0010000	Reply Memorandum	03/15/10	03/29/10	PET001	TBA		03/29/10	NF NF
0011000	Open Court Proceeding April 2, 2010, Hon. Susan Souder. Hearing had, order to be filed.	04/02/10	04/02/10	000	SS		05/25/10	SJ EMH
0012000	Memorandum opinion of the Court affirming in part and remanding in part to the County Board of Appeals for further proceedings	05/25/10	05/25/10	000	SS	Granted/Denied in	05/25/10	EMH
0013000	Order of Court affirming opinion of	05/25/10	05/25/10	000	SS	Granted/Denied in	05/25/10	EMH

Board of Appeals dated 10/2/09 regarding
Hammond's vested rights argument and reversing and remanding as
to Hammond's estoppel claim

Num/Seq	Description	Filed	Entered	Party	Jdg	Ruling	Closed	User ID
0014000	DOCKET ENTRIES SENT TO COUNTY BOARD OF APPEALS	05/28/10	05/28/10	000	TBA			AEF

TICKLE

Code	Tickle Name	Status	Expires	#Days	AutoExpire	GoAhead	From	Type	Num	Seq
1ANS	1st Answer Tickle	CLOSED	10/30/09	0	no	no	DANS	D	001	001
1YRT	One Year Tickle (Jud	CLOSED	10/28/10	365	no	no	DAAA	D	001	000
EXPU	Exhibit Pickup Notic	CLOSED	07/24/10	30	no	no			000	000
SLTR	Set List For Trial	CANCEL	10/30/09	0	yes	no	1ANS	T	001	001
SLTR	Set List For Trial	CANCEL	12/10/09	0	yes	no	DTRA	D	003	000

EXHIBITS

Line #	Marked	Code	Description	SpH	Sloc	NoticeDt	Disp Dt	Dis By
Offered By: ADA 001 Baltimore County Board Of App								
000		B.	BOX 686/CBA TRANSC		B			

ACCOUNTING SUMMARY

NON-INVOICED OBLIGATIONS AND PAYMENTS

Date	Rcpt/Initials	Acct Desc	Oblig	Payment	Total	MOP	Balance
10/29/09	200900028201/MAB	1102 CF-Civil Fil	.00	80.00	-80.00	CK	-80.00
10/29/09	200900028201/MAB	1500 Appearance F	.00	10.00	-10.00	CK	-90.00
10/29/09	200900028201/MAB	1265 MLSC	.00	25.00	-25.00	CK	-115.00
10/30/09		1500 Appearance F	10.00	.00	10.00		-105.00
10/30/09		1265 MLSC	25.00	.00	25.00		-80.00
10/30/09		1102 CF-Civil Fil	80.00	.00	80.00		.00

Baltimore County, Maryland

OFFICE OF PEOPLE'S COUNSEL
Room 47, Old CourtHouse
400 Washington Ave.
Towson, MD 21204

(410) 887-2188

PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

June 11, 2003

RECEIVED
JUN 11 2003
BALTIMORE COUNTY
BOARD OF APPEALS

Lawrence M. Stahl, Esquire, Chairman
County Board of Appeals
400 Washington Avenue, Room 49
Towson, MD 21204

Re: Petition for Special Hearing
11942 & 11950 Falls Road
James M. Hammond – Petitioner
Case No.: 03-366-SPH; Hearing Date: June 25, 2003 at 10:00 a.m.

Dear Chairman Stahl,

Many citizens have expressed concern about this case. In view of the public interest, our office sends this letter both to express its interest and summarize the key issues.

This special hearing petition requests determination of non-conforming use status for lawn and garden equipment sales and for an engine repair facility. The property is on the west side of Falls Road, about 2000 feet north of the Padonia Road intersection, in a rural part of Cockeysville. It is 1.675 acres in size and has three buildings, Buildings "A", "B", and "C". The zoning classification is R.C. 4 (Watershed Protection).

The questions presented concern the extent of the non-conforming use and whether there has been any change or cessation which would terminate the use. The relevant Baltimore County Zoning Regulation states:

> " **BCZR 101: Non-Conforming Use- A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.**
>
> **BCZR 104.1: 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. [Bill Nos. 18-1976;124-1991]"**

In some cases, this inquiry requires an investigation back to 1945, the beginning year for zoning in Baltimore County. Here, however, it is helpful that a November 30, 1988 Zoning Commissioner decision in Case No. 89-204-SPH provides a baseline. This case established a non-conforming use on this property. The order states:

> **" THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore, this 30th day of November, 1988 that the Petition for Special Hearing to approve a nonconforming use for a Country Store, with Food and Grocery sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, not including contractors or construction companies, landscaping or trucking operation or an automobile service garage, as indicated on Petitioner's Exhibit 1, which shall become the final development plan and final site plan, be and the same is hereby GRANTED."**

In the course of the opinion, the Commissioner stated, among other things:

> **"There are no off site contractors or construction companies using this site, nor are any landscaping or trucking operation being undertaken. There is no automotive service garage and none will be permitted on this site. The service of lawn mowers is only for products sold on site."**

We enclose the full opinion and order. There was no appeal. A subsequent decision, in Case No. 94-14, approved a barbershop, but this use never materialized and may be disregarded.

While the case now before the County Board of Appeals is de novo, we can glean from the Deputy Zoning Commissioner's opinion, dated April 11, 2003, and from review with citizens that there are several particular issues regarding change in use which are likely to present themselves:

1. Would servicing of lawn and garden equipment to the general public (and not just for equipment sold onsite) be a change in use?
2. Do the renovations to the building, completed or planned, involve a change in use?
3. Does the storage of automobiles, commercial vehicles and equipment and other objects about the site involve a change in use?
4. Does the proposed engine repair facility involve a change in use?

If there has been a change in use, that would terminate the non-conforming use. If there has been no change yet, but the proposals involve a change, then the change must be disallowed.

It is to be remembered that the law disfavors nonconforming uses and intends that they disappear with the passage of time. Prince George's County v E.L. Gardner 293 Md. 259 (1982). In McKemy v. Baltimore County 39 Md.App. 257, 269 (1978), Judge Wilner articulated criteria to be considered in the evaluation of change under BCZR 104.1:

" (1) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;

(2) Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature, and kind:

(3) Does the current use have a substantially different effect upon the neighborhood;

(4) Is the current use a "drastic enlargement or extension" of the original nonconforming use."

These criteria should be very helpful in the present case.

Separately, with respect to abandonment or discontinuity, it is to be remembered that any cessation of use for a period of one year or more would terminate the use. If the evidence shows that subsequent to November 30, 1988, there has been a cessation of the non-conforming use for at least one year, that would disqualify any further such use. Canada's Tavern v. Town of Glen Echo. 260 Md. 206 (1970).

We trust that this outline will assist the Board in its review of this matter. As there are able attorneys on the side of both the Petitioner and the neighboring Protestants, we anticipate there will be a full factual presentation. We respectfully request the opportunity to provide further legal analysis if it appears helpful, necessary, or appropriate.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

Carole S. Demilio/RMW

Carole S Demilio, Esquire
Deputy People's Counsel for Baltimore County

PMZ/CSD/rmw
Enclosure

cc: John C. Murphy, Esquire
Barbara Jung
John Galbreath

IN RE: PETITION FOR SPECIAL HEARING
WS Falls Road, 2200' NW
Broadway Road
(11943 & 11950 Falls Road)
3rd Councilmanic District
8th Election District
Legal Owner: Robert Dold,
Contract Purchaser:
Dennis Peddy

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* CASE # 89-204 SPH
*

****

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses; namely, Barbara Jung, Mr. Louis J. Pucci, Mr.and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales.

Baltimore County, Maryland

OFFICE OF PEOPLE'S COUNSEL

Jefferson Building
105 West Chesapeake Avenue, Room 204
Towson, Maryland 21204

410-887-2188
Fax: 410-823-4236

PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

June 1, 2009

Lawrence M. Stahl, Esquire, Chairman
County Board of Appeals
105 W. Chesapeake Avenue, Suite 203
Towson, MD 21204

RECEIVED
JUN 0 1 2009
BALTIMORE COUNTY
BOARD OF APPEALS

Re: Petition for Special Hearing
11942 & 11950 Falls Road
James M. Hammond – Petitioner
Case No.: 03-366-SPH;
County Board of Appeals Remand deliberation date: June 11, 2009 at 9:30 a.m.

Dear Chairman Stahl,

This protracted zoning litigation began six years ago, in 2003. Upon judicial review of the Board's October 27, 2003 decision, the Court of Special Appeals (COSA) issued a detailed remand opinion on November 15, 2005. There ensued the filing of memoranda, oral argument, deliberation, and a second Board decision on September 28, 2006. Upon judicial review, Judge Susan Souder issued her decision on March 21, 2007, again remanding the case to the CBA. There was no appeal of her decision. The time is ripe for the CBA to respond to the remand.

The membership of the Board panel has changed. Panel Chairman Stahl remains from the 2003 panel. Edward Crizer was on the 2006 panel. There will be a new member to replace Margaret Brassil, who came in on the 2006 panel, but has since left the Board.

To assist the Board's deliberation, it is important to consider the scope of the latest remand and to state our position. Judge Souder resolved the question of whether petitioner Hammond's lawnmower business use is a lawful intensification of a nonconforming use or an unlawful extension. She determined, based on the undisputed material facts, that the use us an unlawful extension. Opinion pages 7-10. Therefore, her order reversed the CBA's finding that the lawnmower business is a lawful intensification.

In her conclusion, Judge Souder stated the basis for the remand. She wrote,

> "As the issues have not previously been the subject of any findings and for the reasons stated in the 2005 COSA Opinion pp. 54-55, on remand the Board should consider Hammond's estoppel and vested rights claims."

In this connection, her Order also remanded the case for further proceedings consistent with the COSA opinion, concerning estoppel and vested rights.

Accordingly, for the Board panel's convenience, we enclose pages 51-57 of the COSA opinion, in which Judge Ellen Hollander discussed the subject and instructed the CBA to consider these issues on remand. Judge Hollander concluded, on page 55,

> "Without a ruling from the Board, we are unable to conduct our judicial review function. Therefore, on remand, in the event that the Board determines that appellant's business is not a lawful intensification, it should proceed to address appellant's estoppel and vested rights contentions, and determine whether they apply here to protect appellant."

Now that Judge Souder has determined that Hammond's business is not a lawful intensification, the Board must proceed to address these issues. Our office addressed the issues of estoppel and vested rights in our initial remand memorandum filed on February 22, 2006. For the reasons there stated, we argued that petitioner Hammond is not entitled to claim any estoppel or vested rights to allow continuation of his lawnmower business use. We stand by the argument in our memorandum, which we enclose for the panel's convenient reading.

Again, we hope and trust that this letter is of assistance in the Board's deliberation.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County

PMZ/rmw
Enclosure

cc: John C. Murphy, Esquire, Attorney for petitioner
Barbara Jung
Paul Mayhew, Assistant County Attorney

BOARD OF APPEALS OF BALTIMORE COUNTY

MINUTES OF DELIBERATION

IN THE MATTER OF: James G. Hammond
Case No.: 03-366-SPH

DATE: August 26, 2003

BOARD/PANEL:

Charles L. Marks	CLM
Margaret Worrall	MW
Lawrence M. Stahl	LMS

RECORDED BY: Theresa R. Shelton / Legal Secretary

PURPOSE: To deliberate Petition for Special Hearing filed by James Hammond requesting clarification that lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site and to amend the prior orders in case 89-204-SPH and 94-14 SPH, if necessary.

PANEL MEMBERS DISCUSSED THE FOLLOWING:

- Contractual jurisdiction is outside the scope of the Board
- Interpretation letter issued by PDM ($40.00) discussed – inappropriate for County to issue – misleading – the public relies on the letters, in lieu of requesting special hearings / Letters are opinions only and the County should discontinue
- From 1945 to 1972 the facility was a Country Store and the lawnmower selling/services never took place, even though it had been approved.
- Timeframe extended beyond year of abandonment use / 15 years
- No continual use as lawnmower sales/service
- Essential element – abandonment of use

DECISIONS BY BOARD MEMBERS: Unanimous decision by the panel members to AFFIRM the Zoning Commissioner's Order denying the Petitioner's request to re-establish lawn and garden equipment sales and service.

FINAL DECISION: Petition for Special Hearing filed by James Hammond requesting clarification that lawn and garden equipment sales and service are allowed, with service not being limited to products sold on site and to amend the prior orders in case 89-204-SPH and 94-14 SPH, if necessary is DENIED.

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

Theresa R. Shelton
County Board of Appeals

BOARD OF APPEALS OF BALTIMORE COUNTY

MINUTES OF DELIBERATION

COPY

IN THE MATTER OF: James G. Hammond
Legal Owner/Petitioner
11942 &11950 Falls Road
Case No.: 03-366-SPH

DATE : May 2, 2006

BOARD/PANEL Lawrence M. Stahl
Dr. Margaret Brassil
Edward Crizer, Jr.

RECORDED BY: Linda B. Fliegel/Legal Secretary

PURPOSE: Case is on Remand from the Circuit Court for Baltimore County and the Court of Special Appeals. Judge Hollander, from the Court of Special Appeals stated "it is incumbent upon the Board to determine whether the lawn mower business is a lawful intensification of the original non-conforming use."

Summary of Events:

1) Deputy Zoning Commissioner *DENIED* – April 11, 2003.
2) Board of Appeals *DENIED* – October 17, 2003.
3) Petition for Review filed – November 12, 2003.
4) Circuit Court Judge Hennegan *AFFIRMED* the Board – July 13, 2004
5) Opinion of the Court of Special Appeals – Circuit Court decision is vacated and matter remanded, with instructions, to the Circuit Court to remand to the Board of Appeals - November 15, 2005.
6) Board convened for hearing on Feb. 28, 2006.
7) Public Deliberation – May 2, 2006.

PANEL MEMBERS DISCUSSED THE FOLLOWING:

STANDING

- The multi-service business was primarily a general store, with additional services, that met the needs of the area. Some of the services included a deli, household hardware items, lawn mowers sales/service, Christmas trees, plants, etc.
- Does an intensification lapse if it ceases to operate and the primary business continues?
- Is a lawn mowers business a permitted intensification?
- Does the percentage of the use, from primarily a country store to primarily a lawn mowers sales and service business, change the nature and kind of the initial zoning offered?
- Use of other buildings on the property – Bldg. C is to become a show room for lawn mowers sales.
- Building C is located toward the back of the property.

Forklift is fine because it is needed for loading, unloading, and transporting various items used by the business.
Basically it fails to meet all four of the following criteria:

a) Nature and purpose of the originally allowed;
b) Character, nature and kind of original non-conforming use;
c) Effect of proposed use on neighborhood; and
d) Drastic change from the original non-conforming use.

The criteria in the testimony was not met, however, with conditions it could be permissible. Some of the conditions considered could be as follows:

a) Sales and service of various mowers used by homeowners only, nothing of the commercial nature;
b) Trailer would be permitted, but not a huge piece of equipment, only something that could transport two, possibly three, pieces of equipment;
c) Repair shop would need to be at the back of the property;
d) Would not allow the repair of motor vehicles;
e) Only allow the repairing of tools that would be used by homeowners, i.e., lawn mowers, tillers, chippers, etc.;
f) Noise would be limited by setting time guidelines on repair of equipment with heavy duty tools (air compressors, etc.).;
g) To ensure that neighbors would be able to enjoy their weekends in peace and quiet, the use of noisy/loud tools and equipment would not be allowed on Saturdays and Sundays.

DECISION BY BOARD MEMBERS:

The majority of the Board felt that the Petitioner's request could be granted with restrictions. The remaining Board member expressed that while the restrictions could make it fit into the category of non-conforming use, she felt that it was more in keeping with that of a special exception.

FINAL DECISION: After a thorough deliberation of the facts and law, the majority of the Board members decided to *GRANT* the Petitioner's request. The minority Board member will be writing a dissenting opinion on the matter.

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 the Board.

Respectfully Submitted

Linda B. Fliegel

Linda B. Fliegel
County Board of Appeals

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: James Hammond 03-366-SPH

DATE: June 11, 2009

BOARD/PANEL: Lawrence Stahl
Maureen Murphy
Edward Crizer, Jr.

RECORDED BY: Sunny Cannington/Legal Secretary

PURPOSE: To deliberate the following:

1. Mr. Hammond's estoppel and vested rights claims and for proceedings consistent with the Opinion of the Court of Special Appeals filed November 15, 2005 as Order by Judge Souder with the Circuit Court for Baltimore County on March 15, 2007.

PANEL MEMBERS DISCUSSED THE FOLLOWING:

STANDING

- The Board discussed the history of this matter. This matter came before the Board on a Petition for Special hearing wherein the Petitioner requested clarification that a lawn and garden equipment sales and service business are allowed with the service not being limited to products sold on site and to amend prior orders in case numbers 89-204-SPH and 94-14-SPH, if necessary. The Board originally heard this case and issued their opinion on October 17, 2003 wherein they Denied the allowance of the lawn and garden equipment sales and service business. This matter then went before the Circuit Court for Baltimore County and an Opinion was issued Affirming the decision of the Board. This matter was then appealed to the Court of Special Appeals who issued a decision, dated November 15, 2005, Vacating the Opinion of the Circuit Court and Remanding this matter to the Board for further proceedings. This matter came back to the Board and on September 28, 2006 the Board issued their Order on Remand from the Circuit Court Granting the relief with restrictions pursuant to the Opinion of the Court of Special Appeals. This matter was then appealed to the Circuit Court who issued its Opinion dated March 15, 2007, Reversing the September 28, 2006 Opinion of the Board and Remanding this matter to the Board for further proceedings consistent with the November 15, 2005 Opinion of the Court of Special Appeals concerning Mr. Hammond's estoppel and vested rights claims.
- The Board discussed the Opinion of the Court of Special Appeals and the insight of the Court with regard to estoppel and vested rights claims.
- Mr. Hammond had relied on a letter from Mr. Moxley the employee of Commissioner Haines. The Court indicated that "[T]he doctrine of equitable estoppel cannot defeat a

municipality's enforcement of its own ordinances because of an error of its agent on which a third party may have relied." and that "The law is clear that in the absence of arbitrary, capricious or egregious conduct on the part of the county official, zoning estoppel does not apply." The Board feels that it is not uncommon, nor unreasonable that a County employee could be unintentionally wrong. The Board does not believe that equitable estoppel saves Mr. Hammond's claim.

- The Board then reviewed the doctrine of vested rights, as per the Order of the Court of Special Appeals, which "...provides that 'a landowner may rely on nothing other than a properly-issued permit, and that a substantial change in circumstances will not be found unless the landowner begins actual, above-ground construction'." The Board determined that since this appeal was ongoing, Mr. Hammond never had a valid permit to begin the construction.

DECISION BY BOARD MEMBERS: The Board members decided that the estoppel and vested rights claims of Mr. Hammond do not save him.

FINAL DECISION: After thorough review of the facts, testimony, and law in the matter, the Board unanimously agreed that Mr. Hammond's estoppel and vested rights claims are denied.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above 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 the Board.

Respectfully Submitted,

Sunny Cannington

Sunny Cannington

BOARD OF APPEALS OF BALTIMORE COUNTY
MINUTES OF DELIBERATION

IN THE MATTER OF: James Hammond 03-366-SPH

DATE: August 17, 2010

BOARD/PANEL: Lawrence Stahl
Maureen Murphy
Edward Crizer, Jr.

RECORDED BY: Theresa R. Shelton, Administrator

PURPOSE: To deliberate the following:

1. For proceedings consistent with the Order by Judge Souder with the Circuit Court for Baltimore County filed on May 24, 2010.

PANEL MEMBERS DISCUSSED THE FOLLOWING:

- The Board discussed incorporating it's Opinion and part of People's Counsel Memo to further clarify the correct test for estoppels and in particular to the section on page 11 of the Board's Order that was legally incorrect.
- Nothing in the Opinion previously issued has changed. The Board and the Circuit Court are in agreement with regards to Mr. Hammond's estoppel and vested rights claims.
- The Board that the Opinion issued was the right result; however, it will re-iterate the cases further
- The Board will be more precise and will further clarify case law

DECISION BY BOARD MEMBERS: The Board members decided that the ruling of the opinion in which Mr. Hammond's estoppel and vested rights claims are denied remains unchanged; however, the Board will further clarify in the Remand Opinion how that result was reached.

FINAL DECISION: After thorough review of the facts, testimony, and law in the matter, the Board unanimously agreed to incorporating it's Opinion and part of People's Counsel Memo to further clarify the correct test for estoppels and in particular to the section on page 11 of the Board's Order that was legally incorrect.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place on the above 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 the Board.

Respectfully Submitted,

Theresa R. Shelton

Theresa R. Shelton

03-C-06-11166

IN THE CIRCUIT COURT FOR

BALTIMORE COUNTY

PETITION OF JAMES G. HAMMOND
11942 Falls Road
Cockeysville, Md. 21030

FOR JUDICIAL REVIEW OF THE DECISION OF THE

BOARD OF APPEALS OF BALTIMORE COUNTY
Court House
Towson, Md. 21204

IN THE CASE OF JAMES G. HAMMOND
Case No. 03-366-SPH

James G. Hammond, a party to the proceeding, requests judicial review of the decision entered on September 28, 2006.

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

I hereby certify that I mailed a copy of the foregoing petition to the Board of Appeals, Court House, Towson, Md. 21204, this 20th day of October, 2006.

John C. Murphy

RECEIVED
OCT 25 2006
BALTIMORE COUNTY
BOARD OF APPEALS

FILED OCT 23 2006

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

Case Number: 03-C-06-011166

TO: BOARD OF APPEALS OF BALTIMORE COUNTY
Courthouse
Towson, MD 21204

RECEIVED
OCT 25 2006
BALTIMORE COUNTY
BOARD OF APPEALS

Law Offices
John C. Murphy
John C. Murphy
John Cannan
516 N. Charles Street, Suite 206
Baltimore, Md. 21201
jcmurphy@bellatlantic.net
410-625-4828
443-956-8711
Fax 410-625-0273

May 21, 2003

Mr. Lawrence Stahl, Chairman
Board of Appeals
Room 49
Old Courthouse
400 Washington Street
Towson, Md. 21204

Re: Case No. 03-366-SPH
11942 & 11950 Falls Road

Dear Mr. Stahl:

I spoke with your office today and again re-iterated my request that if possible this case be advanced on the docket because of hardship. This appeal was filed on April 17, 2003. The purpose of the special hearing request was to allow the repair of lawn and garden equipment. The applicant purchased the property for this purpose and it is a very great hardship on him to miss his season.

It is respectfully requested that the appeal be scheduled at the earliest possible date.

Thank you and best wishes.

Sincerely,

John C. Murphy

Cc: Mr. James G. Hammond

Ham-bzaltr

RECEIVED
MAY 2 2 2003
BALTIMORE COUNTY
BOARD OF APPEALS

Law Offices
John C. Murphy
516 N. Charles Street, Suite 206
Baltimore, Md. 21201
jcmurphy@bellatlantic.net

John C. Murphy
John Cannan

410-625-4828
443-956-8711
Fax 410-625-0273

April 17, 2003

Mr. Arnold Jablon
Director
Baltimore County Department of Permits and
Development Management
County Office Building
111 W. Chesapeake Avenue Room 111
Towson, Maryland, 21204

Re: Appeal of Case No. 03-366-SPH
Denial of Special Hearing

Dear Mr. Jablon:

Please consider this notice of an appeal by Mr. James G. Hammond of the following case heard before the Deputy Zoning Commissioner of Baltimore County:

In Re: Petition for Variance
W/S of Falls Road, 2,200' N of Broadway Road
8th Election District
3rd Councilmanic District
(11942 & 11950 Falls Road)
James G. Hammond, Petitioner
Case Number: 03-366-SPH

This decision was issued on April 11, 2003. It denied the petitioner's request for a special hearing. A check for $300 for the $225 appeal fee and $75 sign fee is enclosed.

If you have any questions, please free to contact me.

Sincerely,

John C. Murphy

cc: Mr. James G. Hammond

Law Offices
John C. Murphy

John C. Murphy
516 N. Charles St., Suite 206
Baltimore, Md. 21201
jcmurphy@verizon.net

410-625-4828
443-956-8711
Fax 410-625-0273

October 20, 2006

Clerk, Circuit Court for Baltimore County
County Courts Building
Towson, Md. 21204

Re: Hammond Appeal

Dear Mr. Clerk:

Enclosed are original and one copy of petition of appeal in the above case along with my check for $115.00

Sincerely,

John C. Murphy

Cc:

Board of Appeals
Court House
Towson, Md. 21204

Baltimore county circuit court

RECEIVED
OCT 23 2006
BALTIMORE COUNTY
BOARD OF APPEALS

IN THE CIRCUIT COURT FOR

BALTIMORE COUNTY

PETITION OF JAMES G. HAMMOND
11942 Falls Road
Cockeysville, Md. 21030

FOR JUDICIAL REVIEW OF THE DECISION OF THE

BOARD OF APPEALS OF BALTIMORE COUNTY
Court House
Towson, Md. 21204

IN THE CASE OF JAMES G. HAMMOND
Case No. 03-366-SPH

James G. Hammond, a party to the proceeding, requests judicial review of the decision entered on September 28, 2006.

John C. Murphy
516 N. Charles Street
Suite 206
Baltimore, Md. 21201
410-625-4828
Attorney for the Petitioner

I hereby certify that I mailed a copy of the foregoing petition to the Board of Appeals, Court House, Towson, Md. 21204, this 20th day of October, 2006.

John C. Murphy

RECEIVED
JUN 0 3 2009
BALTIMORE COUNTY
BOARD OF APPEALS

Law Offices
John C. Murphy
516 N. Charles St., Suite 206
Baltimore, Md. 21201
jcmurphy@verizon.net

John C. Murphy
410-625-4828
443-956-8711
Fax 410-625-0273

June 2, 2009

Lawrence M. Stahl, Esquire
County Board of Appeals
105 W. Chesapeake Avenue, Suite 203
Towson, Md. 21204

Re: James G. Hammond
Case No. 03-366-SPH
11942 & 11950 Falls Road

Dear Mr. Stahl:

I am responding to Mr. Zimmerman's letter of June 1, 2009.

As the Board will recall this case involves a Baltimore County citizen who has been embroiled in proceedings for the last six years after being assured by the written determination of the zoning officials that his proposed use of lawn mower sales and service was allowed.

Mr. Zimmerman misstates the case. Judge Souder ruled that the Board followed incorrect standards. In her final paragraph on page 10, she stated:

"The board appears to have assumed that a lawnmower business identical to the Dold business approved in 1988 was automatically acceptable in 2003 without making any findings. The Board then found that the 2003 Hammond proposal was an acceptable intensification of the Dold business. It is clear, however, that the Board was required to consider the original (1945) nonconforming use, that is, the country store and determine whether Hammond's proposed business is an intensification of the original nonconforming use, that is, the Country store".

In its decision of September 28, 2006, the Board did not do this. Rather, it determined that the Hammond use was basically identical to the Dold use approved by the Haines decision in 1988. In other words, according to Judge Souder, the Board committed a legal error by not making "any findings" about

whether the "Dold business approved in 1988 was automatically acceptable in 2003".

All Judge Souder did was determine that the Board did not follow the correct legal standards and that its finding that the use was a lawful intensification could not stand since it did not make any findings about whether Mr. Hammond's use was a lawful intensification of the original 1945 country store. Here the Board's findings were inadequate because they applied the wrong standard, in the words of Judge Souder, they assumed that the question was whether Hammond's use was consistent with the Dold use approved by the Haines decision. But Mr. Hammond has the right to a correctly decided decision of the Board of Appeals, applying the correct standard. A reviewing court sits to decide whether the correct standards were followed. Where the decision contains inadequate findings, the remedy is have a correct decision embodying the correct standards. The leading case is United Steelworkers v. Beth Steel, 298 Md. 665, 679 (1984).

What is to be the result now? Certainly it would be intolerable to follow Mr. Zimmerman's suggestion and find that Mr. Hammond has lost his right to intensification because the Board committed a legal error, in the opinion of Judge Souder. After all, Mr. Hammond is the innocent citizen here. As the Board stated in its decision of October 17, 2003:

"Finally, we are not unmindful of the position in which the petitioner was placed by virtue of the letter to him of April 20, 2001 from the Baltimore County Department of Permits and Development Management. It was arguably not unreasonable for him to rely upon that communication to proceed with his project. It is only a matter of conjecture on the part of this Board as to whether or not the writer of that letter, Mr. Lloyd T. Moxley, read the entire Haines opinion or just the order which accompanied it".

Mr. Hammond suggests that the proper resolution of this matter is as follows.

The parties are now proceeding on a factual record made not with respect to Mr. Hammond's actual use of a lawn mower sales and service but with respect to his proposed use as it was described back in 2003. Since then, beginning in July 2007, the lawn mower business has been operating because the prior rulings were reversed. It is not a proposed use, it is an actual use. In order to deal with reality, the Board needs to consider that actual use and determine, according to Judge Souder, whether the existing use is a lawful intensification of the 1945 non conforming use. The Board can then consider an actual use according to the standards established by Judge Souder. As a matter of fact, this is exactly what

happened before. The Haines decision reviewed an actual use then being conducted by the Dolds. It is obviously the best way to arrive at a decision.

Moreover, in the proceedings of this Board which resulted in the September 28, 2006 opinion and order, the Board did not have the benefit of Judge Souder's decision, namely that the issue was the intensification of the 1945 country store. At a new hearing, the parties can present evidence on this issue and the Board can apply the correct legal standard.

On behalf of Mr. Hammond, this request is make that the Board schedule a hearing to determine whether his use is a lawful intensification of the original 1945 non conforming use, as well as the issues of vested rights and estoppel.

Apart from all the legal technicalities, this is the most appropriate result. Mr. Hammond has been almost bankrupted by these six year proceedings. He should not have to suffer any more than he has already. The Board can hold a hearing and deal with reality, the actual use being conducted by Mr. Hammond.

Thank you.

Sincerely,

John C. Murphy

Cc: Mr. James G. Hammond
Ms. Barbara Jung
People's Counsel

ham-bzaltr

Law Offices
John C. Murphy

John C. Murphy
John Cannan

516 N. Charles Street, Suite 206
Baltimore, Md. 21201
jcmurphy@bellatlantic.net

410-625-4828
443-956-8711
Fax 410-625-0273

April 22, 2003

Mr. Lawrence Stahl, Chairman
Board of Appeals
Room 49
Old Courthouse
400 Washington Street
Towson, Md. 21204

Re: Case No. 03-366-SPH
11942 & 11950 Falls Road

Dear Mr. Stahl:

This appeal was filed on April 17, 2003. The purpose of the special hearing request was to allow the repair of lawn and garden equipment. The applicant purchased the property for this purpose and it is a very great hardship on him to miss his season.

It is respectfully requested that the appeal be scheduled at the earliest possible date.

Thank you and best wishes.

Sincerely,

John C. Murphy

Cc: Mr. James G. Hammond

Ham-bzaltr

RECEIVED
APR 22 2003
BALTIMORE COUNTY
BOARD OF APPEALS

THE LAW OFFICES OF JOHN C. MURPHY

FACSIMILE TRANSMITTAL SHEET

TO: Mr. Lawrence Stahl, Chairman	FROM: John C. Murphy
COMPANY: Board of Appeals	DATE: 4/22/03
FAX NUMBER: 410-887-3182	TOTAL NO. OF PAGES INCLUDING COVER: [Click here and type number of pages]
PHONE NUMBER: [Click here and type phone number]	SENDER'S REFERENCE NUMBER:
RE: [Click here and type subject of fax]	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Cc: Mr. James Hammond 410-308-3670

516 N. CHARLES STREET, SUITE 206
PHONE: 410-625-4828 FAX: 410-625-0273
JCMURPHY@BELLATLANTIC.NET

THE LAW OFFICES OF JOHN C. MURPHY

FACSIMILE TRANSMITTAL SHEET

TO: Lawrence M. Stahl	FROM: [Click here and type name]
COMPANY: [Click here and type company name]	DATE: 2/27/2006
FAX NUMBER: 410-887-3182	TOTAL NO. OF PAGES INCLUDING COVER: [Click here and type number of pages]
PHONE NUMBER: [Click here and type phone number]	RE: [Click here and type subject of fax]

NOTES/COMMENTS:

516 N. CHARLES STREET, SUITE 206,
BALTIMORE, MD 21201
PHONE: (410) 625-4828; FAX: (410) 625-0273; CELL: (443) 956-8711

Law Offices
John C. Murphy

John C. Murphy
516 N. Charles St., Suite 206
Baltimore, Md. 21201
jcmurphy@verizon.net

410-625-4828
443-956-8711
Fax 410-625-0273

February 27, 2006

Lawrence M. Stahl, Esq.
Baltimore County Board of Appeals
400 Washington Avenue
Towson, Md. 21204

Re: In the Matter of James G. Hammond
Case Number 03-366-SPH

Dear Mr. Stahl:

This matter is scheduled for hearing for February 28, 2006. The parties have reached an amicable settlement and present to the Board a stipulation which they have agreed to and a proposed order.

Mr. Hammond, Ms. Jung and I will be present at the hearing.

Thank you and best wishes.

Sincerely,

John C. Murphy

Cc: Ms. Barbara Jung
Mr. James Hammond

Hammond BA letter

To:	Theresa Shelton	**Date:**	June 24, 2003
Fax:	410 **410 887 3182**	**From:**	Ken Sadofsky
Phone:	410 887 3182	**Fax:**	443 834 1017
Pages:	4, including this cover sheet.	**Phone:**	410 825 4860 x 123

Please advise if other info needed.

County Board of Appeals of Baltimore County

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

June 2, 2003

NOTICE OF ASSIGNMENT

CASE #: 03-366-SPH

IN THE MATTER OF: *James G. Hammond -Petitioner*
11942 and 11950 Falls Road
8th Election District; 3rd Councilmanic District

4/11/03 – Order of D.Z.C. in which requested special hearing relief was DENIED.

ASSIGNED FOR: **WEDNESDAY, JUNE 25, 2003 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: Counsel for Appellant /Petitioner : John C. Murphy, Esquire
Appellants /Petitioners : James G. Hammond

Barbara Jung
Kim Detrick
Ken Sadofsky

fax 410 887-3182
Thaesa Shelton

Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Director, Department of Permits & Development Management

Printed with Soybean Ink on Recycled Paper

THE FALLS ROAD COMMUNITY ASSOCIATION, INC.

The undersigned hereby acknowledge and attest that the Board of Directors of The Falls Road Community Association, Inc., a Maryland corporation (the "Corporation"), in accordance with Section 2-408 of the Maryland Corporations and Associations Code, do hereby take the actions below set forth, and to evidence their waiver of any right to dissent from such actions, do hereby consent as follows:

RESOLVED: The Falls Road Community Association, Inc. opposes the Petition for Special Hearing of James M. Hammond, concerning 11942 & 11950 Falls Road, before the Board of Appeals of Baltimore County in # 03-366-SPH.

RESOLVED: Ken Sadofsky, Dan Meenan, and David Suarez, who are duly elected members of the Board of Directors of the Falls Road Community Association, Inc., shall attend the hearing on June 25, 2003 before the Board of Appeals of Baltimore County in # 03-366-SPH and testify in opposition to said petition.

AS WITNESS OUR HANDS THIS 12th day of June, 2003.

ATTEST:

By: _____
Dennis Sutton, Secretary

The Falls Road Community Association, Inc.

By: _____
John A. Galbreath, President

AFFIDAVIT

I hereby swear upon penalty of perjury that Ken Sadofsky, Dan Meenan, and David Suarez are duly elected members of the Board of Directors of the Falls Road Community Association, Inc.

ATTEST:

By: _____
Dennis Sutton, Secretary

The Falls Road Community Association, Inc.

By: _____
John A. Galbreath, President

THE FALLS ROAD COMMUNITY ASSOCIATION, INC.

The undersigned hereby acknowledge and attest that the Falls Road Community Association, Inc., a Maryland corporation (the "Corporation"), upon a Motion, duly made and seconded at its annual meeting on October 4, 2002, unanimously decided as follows:

RESOLVED: Responsibility for review and action on all zoning and development matters shall be placed in the board of directors.

AS WITNESS OUR HANDS THIS 19th day of May 2003.

ATTEST:

By: _____
Dennis Sutton, Secretary

The Falls Road Community Association, Inc.

By: _____
John A. Galbreath, President

BARBARA R. JUNG
11939 FALLS ROAD
COCKEYSVILLE, MARYLAND 21030

RECEIVED
AUG 17 2010
BALTIMORE COUNTY
BOARD OF APPEALS

Lawrence M Stahl, Esq.
County Board of Appeals
105 W. Chesapeake Ave Suite 203
Towson, Maryland 21204

August 13, 2010

Re: Case No. 03-366SHP

Dear Chairman Stahl:

The Board of Appeals is scheduled for Public Deliberations for the above case on August 17, 2010.

The very narrow issue which has been remanded to the Board by Judge Souder is the issue of equitable estoppel. Judge Souder found that the Board reached the correct conclusion that equitable estoppel does not apply in this case, but remanded it because the result was reached based on an incorrect application of the law.

Therefore it is my position that the Board need only articulate the correct legal standard for its opinion that equitable estoppel does not apply in this case.

As cited by the Peoples Counsel in his Circuit Court Memorandum, the general rule in Maryland is "that the equitable estoppel doctrine does not, as a general rule, apply to allow avoidance of zoning law based on reliance on mistaken information or even permit issued by officials". Marzulo v. Kahl 399 Md. 158 (2002).

Mr. Hammond attempts to argue that instead of applying this general rule that the Board should apply the very narrow exception to the rule as articulated in Permanent Financial v. Montgomery County 308 Md. 209 (1986). The holding of Permanent is very narrow and fact specific. The facts in the present case do not fit the exception.

In Permanent Fin, the county issued a building permit for a building whose height violated the County's height restriction. The County later revoked the permit and issued a stop work order. Permanent Fin argued that the County should be estopped from enforcing the height restriction because they had issued the permit. The Court found that because the County had a longstanding, written interpretation of the height restriction statute that would allow it's violation in certain circumstances and that in practice, the County had allowed such violations based on the written interpretation, that the County was estopped, in that narrow circumstance, from enforcing the height restriction.

The facts in the present case do not fit the narrow exception to the general rule as laid out in Permanent Fin. These facts fit squarely into the general rule that the County cannot be estopped from enforcing the zoning regulations as articulated in Marzulo v. Kahl 366 Md 158, Relay Improvement Association v. Sycamore Realty Co 105 Md Ap 701, aff'd 344 Md 57, Inlet Associates v. Assateague House 313 Md 413, City of Hagerstown v Long Meadow Shopping Center 264 Md 481 and Lipsitz v. Parr 164 Md 222. Mr. Zimmerman, in his Memorandum for the Circuit Court hearing, discusses these cases in pages 9 –13.

In conclusion, I urge the Board to re-iterate the finding that Equitable Estoppel does not apply in this case.

Sincerely,

Barbara R. Jung

Barbara R. Jung

CC: Peter Max Zimmerman, Esq.
John C. Murphy, Esq.

BARBARA JUNG
11939 FALLS ROAD
COCKEYSVILLE, MARYLAND 21030

RECEIVED
JUN 0 8 2009
BALTIMORE COUNTY
BOARD OF APPEALS

June 5, 2009

Lawrence M. Stahl, Esq.
County Board of Appeals
105 W. Chesapeake Ave. Suite 203
Towson, Md. 21204

Re: James Hammond
Case No. 03-366 SPH
11942 and 11950 Falls Rd.

Dear Mr. Stahl:

As you may remember, I am an interested party in the above named case as I live across the street from the property. I too have been involved in every step of this litigation since 2003.

As Mr. Zimmerman stated in his letter to you, the only issues presently before the Board are the issues of estoppel and vested rights. Judge Souder has already ruled that Mr. Hammond's use of the property is not a lawful intensification.

Mr. Murphy's assertion is that Judge Souder ruled that the Board had used the wrong legal standard in making its determination as to whether the proposed use was an intensification or an extension of the non-conforming use. That assertion is incorrect. If that were correct, Judge Souder would have remanded that issue for the Board's further consideration. She clearly did not remand that issue. Judge Souder's Order, which is the controlling language, states, "The Board of Appeals of Baltimore County Order of Remand ... is reversed". It does not say" reversed and remanded for further consideration."

When the Order is read in conjunction with the Memorandum Opinion issued by Judge Souder, it is abundantly clear that Judge Souder found that there was not sufficient evidence in the record to support the Board's finding that Mr. Hammond's proposed use was a lawful extension and therefore Judge Souder reversed that finding. Judge Souder then went on to find on page 9 that "all the foregoing aspects of

Hammond's proposed and current use appear to represent an expansion or enlargement of the Country store operations in Building A". In the conclusion on page 10, Judge Souder states, "on remand the Board should consider Hammond's estoppel and vested right claims". Judge Souder did not state that the Board should also re-consider it's ruling as to the intensification/expansion argument.

Mr. Hammond elected to not file an appeal of that ruling and it is therefore final. He did not seek clarification from Judge Souder as to whether she meant to remand that case for re-consideration of the intensification argument. He instead hung up his sign and opened the lawn mower repair business in spite of Judge Souder's ruling that such use was illegal.

I strongly disagree with Mr. Murphy's request that the Board should schedule yet another evidentiary hearing to consider whether Mr. Hammond's use is legal. Six years of litigation from the Zoning Commissioner to the Board of Appeals at least four times, to the Circuit Court two times and the Court of Special Appeals once is enough. This litigation needs to end. If Mr. Hammond disagreed with Judge Souder's Order, he should have filed and appeal or asked for a clarification from Judge Souder. He did neither. Judicial decisions need to have finality and need to be enforced.

My position is that the only issues needed to be decided by the Board is exactly what Judge Souder ordered, that is estoppel and vested rights which have already been briefed and argued.

Thank you for your consideration.

Sincerely,

Barbara Jung

Barbara Jung

CC: John C. Murphy, Esq.
Peter Max Zimmerman, Esq.

BALTIMORE COUNTY, MARYLAND
Board of Appeals of Baltimore County
Interoffice Correspondence

TO: Larry S. – *via scan and email*
Ed
Maureen – *via scan and email*

DATE: June 8, 2009

FROM: Theresa

RE: **James Hammond**

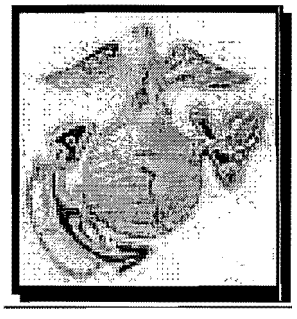
Attached is a letter from Barbara Jung received 6/5/09.

This matter is scheduled for Deliberation on 6/11/09 at 9:30.

Thank you.

Attached: Letter

T



SEMPER FI

Barbara Jung
11939 Falls Road
Cockeysville, Md. 21030

February 3, 2006

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

Re: In the Matter of James G. Hammond
Case # 03-366 SPH

Dear Sir/Madam:

Please notify me of the next hearing date at the above address. I have heard it is scheduled for February 28, 2006. I have not received a notice despite being involved in the original Hearing. Thank you for your anticipated cooperation.

Sincerely,

Barbara Jung

RECEIVED
FEB 0 6 2006
BALTIMORE COUNTY
BOARD OF APPEALS

BARBARA R. JUNG 11939 FALLS ROAD
COCKEYSVILLE, MARYLAND 21030

April 22, 2003

Board of Appeals
Room 49
Old Courthouse
400 Washington Avenue
Towson, Maryland 21204

Re: Case # 03-366-SPH

Dear Sir or Madam:

Please notify me of the hearing date for the appeal in the above named case.

Sincerely,

Barbara Jung

Barbara R. Jung

RECEIVED
APR 24 2003
BALTIMORE COUNTY
BOARD OF APPEALS

GORDON L. CROOKS, II
17 Hickory Meadow Road
Cockeysville, Maryland 21030
410-666-3140

June 25, 2003

RECEIVED
POST-APPEAL

RECEIVED POST-HEARING
DAY ONE

Baltimore County Zoning Board
111 W. Cheaspeake Avenue
Towson, Md. 21
Towson, Md. 21204

Re: 03-366-SPH
Nos. 11942 & 11950

Attn: Board of Appeals:

I understand that the above case is being appealed and would like to state my views. First of all The Dold family operated a lawn equipment sales and repair shop for a good many years. To the best of my knowledge there were never any complaints about their operation. They lived in the area and were good neighbors. The gentlemen who now owns the property also lives in the area, while I don't know him personally, I have never heard any complaints about him or his family.

It is my understanding that two ladies who live nearby are ones the against this for whatever reason, the rest of us are for the proposal. I have lived in this area over 34 years and know for a fact there is a crying need for lawn equipment service. My tractor is currently being repaired, the waiting time is approx. one month because there is only one outfit doing this type of work within ten miles.

It would seem to me that the necessary safeguards could be written in to any approval permit and allow the vast majority of the neighbors to use this service.

Sincerely'

Gordon L. Crooks II

RECEIVED
JUN 25 2003
BALTIMORE COUNTY
BOARD OF APPEALS

RECEIVED
POST-APPEAL

RECEIVED POST-HEARING
DAY ONE

Krysundra Cannington - Re: Hammond - 03-C-06-011166

From: <John.Almond@courts.state.md.us>
To: "Krysundra Cannington" <kcannington@baltimorecountymd.gov>
Date: 12/3/2009 4:00 PM
Subject: Re: Hammond - 03-C-06-011166

Hey Good Afternoon, Sorry I just got this. I ordered them from the basement for tomorrow AM around 8:30 They still look like they are here.
Talk to you in the Am. JOHN

JOHN ALMOND
Supervisor of the Records Room
Circuit Court for Baltimore County

From: Krysundra Cannington
To: John.Almond@courts.state.md.us
CC: Shelton, Theresa
Date: 12/3/2009 9:50 AM
Subject: Hammond - 03-C-06-011166

Hi John,

I hope you had a great Thanksgiving.

I have a file that I am curious to know whether it was ever returned to the Board. This case had gone to the Circuit Court then to The Court of Special Appeals then back to the Circuit Court and was remanded to us. I have all of the relevant opinions but I am unable to locate the original Board of Appeals case file.

Could you please take a look and let me know if you are able to located the original Board of Appeals case file.

The Circuit Court case numbers relevant to this case are 03-C-06-011166 and 03-C-03-012458. In the Matter of James Hammond.

Thank you for all your help.

I hope you have a great day!!!

Sunny

Krysundra "Sunny" Cannington
Legal Secretary
County Board of Appeals
Jefferson Building, Suite 203
105 W. Chesapeake Avenue
Towson, MD 21204
(410) 887-3180
kcannington@baltimorecountymd.gov

PLEASE PRINT CLEARLY

CASE NAME (HAMMOND) 11942 & 11950 FALLS RD
CASE NUMBER 03-366-SPH
DATE 3/20/03

PETITIONER'S SIGN-IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E-MAIL
Bruce E. Doak			
Gorwold Cross & Ertel	320 E Towsontown Blvd	Towson Md 21286	
James G Hammond	1517 Applecroft La	Cockeysville MD 21030	
William Hearn	12004 Boxhill Rd	Cockeysville, MD 21030	
William Sprecher	12401 Falls Rd	Cockeysville MD 21030	
John C. Myers	516 N. Charles St	Balt. Md 21201	

PLEASE PRINT CLEARLY

CASE NAME 119428 (HAMMOND) 11950 Falls Rd
CASE NUMBER 93-366-SPH
DATE 3/20/03

CITIZEN'S SIGN-IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E-MAIL
ROBERT DOLD	1134 SARAZEN	YORK PA 17404	
MARY. V HOMER	11926 FALLS Rd	Cockeysville MD	21030 Petitioner
Angela D. Hammond	1517 Applecroft Lane	Cockeysville, Md	21030
William Hearn	12004 Boxerhill RD	Cockeysville, MD	21030
Wayne Schaeffer	12401 FALLS RD	Cockeysville MD	21030
Charles E. Smith	900 Shawan Valley Drive	Reisterstown Md	21136
Steven B Todd	PO Box 523	Monkton, MD	21111
Ken Sadofsky	11944 Falls Road	Cockeysville, MD	21030
David Suarez-Morias	708 West Padonia Road	Hunt Valley, MD	21030 FallsRoadCommAss.
Kim Detrick	11941 Falls Rd	Cockeysville, MD	Free2222220cs.com
Barbara Jung	11939 Falls Rd	Cockeysville, MD	21030

EXHIBITS

PETITIONER'S

&

PROTESTANTS

20030366 "A"

supplemental

(4)

Verified 6/25/03

CBA-03-366SPH

Exhibits

Petitioner

id only ✓ 1. Murphy's trial memorandum
✓ 2. Petition for NCU granted 1988
✓ 3. letter from Haines (ZC) 1988
✓ 4. Decision/Order 89-204-SPH
✓ 5. Letter (undated) James Hammond to Jablon
6. Letter (April 20, 2001) Shockley to Hammond
✓ 7. Photos A-I
A. Front of rear b/dg.
B. Bldg. w/ view from Falls Rd, facing west
C. View looking north
D. From hillside + driveway
E. Driveway over small stream
F. Front of stone
G. New trees to screen
H. Vehicles & tractor on lot in snow
I. Front of rear b/dg. facing north
✓ 8. Plat of subject property
✓ 9. Draft - restrictions to be imposed by CBA
✓ 10. Sign in sheets in support of Pet. from DEC hearing
✓ 11. letter from FRCA 12/13/02
✓ 12. letter from Dr. Ills 3/18/03
✓ 13. letter from Speecher

Protestant

1. Rule 8 papers from FRCA ✓

Prepared by Murphy Pet. #1 (id only)

IN RE: PETITION FOR SPECIAL HEARING WS Falls Road, 2200 ' north of Broadway Road (11942 & 11950 Falls Road) 8th Election District – 3rd Councilmanic District Legal Owner: James G. Hammond	* * * * * * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 03-366-SPH

****

A B C D E F

PETITIONER'S HEARING MEMORANDUM

This case concerns the correct description of a non-conforming use for "lawn mower sales and service". James Hammond requests a ruling from the Board that he can operate a business on the property consisting of the sale and service of lawn mowers and other garden equipment. Deputy Commissioner Kotroco ruled that the service of lawn mowers could be only lawn mowers purchased at the site. Mr. Hammond requests a ruling that the use has to include both the sale and service of lawn mowers, but that he is not limited to the repair of lawn mowers actually purchased on the property.

History and Non-conforming Use Ruling. In 1988, the then owner, Robert Dold, and a potential lessee, Dennis Peddy, filed an application which recited that Peddy wanted to lease the property for flowers, plants and supplies, and seasonal Christmas tree sales. (Attached as Exhibit A). They asked that the Zoning Commissioner rule that these uses were the "continuation of a non-conforming use". With the application they filed a chronology of uses on the site going back to 1915 when Han's Feed & Grocery Store – country store" existed.

Pet. #2

EXHIBIT A

PETITION FOR SPECIAL HEARING

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY: 89-204-SPH

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 Baltimore County Zoning Regulations, to determine whether or not the Zoning Commissioner and/or Deputy Zoning Commissioner should approve

the continuance of non-conforming use of the property located at

11942-11950 Falls Road. (See Attached)

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

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

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.

MAP	
	2D
E. D.	1st
DATE	2-2-89
200	BF
1000	BF
DP	

Contract Purchaser:

Dennis Peddy
(Type or Print Name)

Dennis Peddy
Signature

12717 Falls Road
Address

Cockeysville, Maryland 21030
City and State

Legal Owner(s):

Robert Dold
(Type or Print Name)

Robert Dold
Signature

(Type or Print Name)

Signature

Attorney for Petitioner:

Steven I. Batoff
(Type or Print Name)

Signature

Offit & Batoff, P.A.
Suite 110, 2330 W. Joppa Rd.
Address

Baltimore, Maryland 21093
City and State

Attorney's Telephone No.: 296-6444

11948 Falls Road 666-3786
Address Phone No.

Cockeysville, Maryland 21030
City and State

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

Steven I. Batoff
Name
Offit & Batoff, P.A.
Ste. 110, 2330 W. Joppa Rd. 296-6444
Address Phone No.
Baltimore, Md 21093

ORDERED By The Zoning Commissioner of Baltimore County, this 13th day of October, 1988, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the 7th day of December, 1988 at 11 o'clock A.M.

Rescheduled to: Nov. 25, 1988 at 9:00 a.m.

Pet. #3

Baltimore County
Zoning Commissioner
Office of Planning & Zoning
Towson, Maryland 21204
494-3353

J. Robert Haines
Zoning Commissioner

November 30, 1988

Dennis F. Rasmussen
County Executive

Steven I. Batoff, Esquire
Offit and Batoff,P.A.
Suite 110, 2330 W. Joppa Road
Baltimore County, Md. 21093

RE: Petition for Special Hearing
Case #89-204 SPH
Legal Owner: Robert Dold, Contract Purchaser: Dennis Peddy

Dear Mr. Batoff:

Enclosed please find the decision rendered on the above captioned case. The Petition for Special Hearing has been granted, in accordance with the attached 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 of the date of the Order to the County Board of Appeals. If you require additional information concerning filing an appeal, pleae feel free to contact our Appeals Clerk at 494-3391.

Very truly yours,

J. Robert Haines

J. Robert Haines
Zoning Commissioner

JRH:mmn
att.
cc: Peoples Counsel

RECEIVED FOR FILING

Per. #4

EXHIBIT B

IN RE: PETITION FOR SPECIAL HEARING * BEFORE THE
WS Falls Road, 2200' NW *
Broadway Road * ZONING COMMISSIONER
(11943 & 11950 Falls Road)
3rd Councilmanic District * OF BALTIMORE COUNTY
8th Election District
Legal Owner: Robert Dold, * CASE # 89-204 SPH
Contract Purchaser:
Dennis Peddy *

****

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner herein requests approval of a nonconforming use for a Country Store, with Food and Grocery Sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, the property being located at 11942-11950 Falls Road, as more particularly described on Petitioner's Exhibit 1.

The Petitioner, Dennis Peddy, appeared and testified. He was represented by Steven I. Batoff, Esquire. The Petitioner was supported in his request by the testimony of the legal owner, Robert Dold, and several other witnesses; namely, Barbara Jung, Mr. Louis J. Pucci, Mr.and Mrs. N.R. Griffin and Mr. Robert J. Hoffman. Mr. Pryor also appeared and testified that the site surveyor and plan prepared by John Etzel is correct and accurately represents the improvements on the land. There were no Protestants.

The Petitioner has requested that a nonconforming use be established upon the 1.5 acre lot of ground known as 11950 and 11942 Falls Road. The land is currently zoned R.C.5 and is improved with three buildings and parking areas. The site plan was accepted as Petitioner's Exhibit 1. The nonconforming use requested is for a General Store with Gasoline Sales.

ORDER RECEIVED FOR FILING
Date 11/28/88
By

Ret. 45

EXHIBIT C

James Hammond
1517 Applecroft Way
Cockeysville, MD 21230
Telephone: 410-252-0782

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

RE: Recertification / Clarification of Non-Conforming Use (SPH #89-204)

Property Owner: Mr. And Mrs. Robert E. Dold
Property Location: 11948 Falls Road, Cockeysville, MD 21030
Identification: Tax Map 50, Grid 24, Parcels 267 and 297

Dear Mr. Jablon,

As directed by your office, I am submitting this Letter of Spirit and Intent in order to clarify and re-establish the non-conforming use certification of the above referenced property. I am currently working with the property owner in a transaction involving the property.

The rear 900sf building was formerly approved and used for a lawn mower sales and service operation. Subsequently, the building has been used as a gift shop. I propose to reestablish the lawn mower sales and service operation and continue the additional uses listed below. I would also like assurance that, in the event the building is destroyed, the improvements may be rebuilt.

On April 6, 2001, I reviewed the Decision and Order rendered for the Special Hearing (SPH 89-204) and consulted with the planners on duty that day. Based on the information provided, it is my understanding that the following uses are permitted on the site in perpetuity, i.e., that there are no time limitations or restrictions on the continuation of the uses as approved by the Decision and Order:

1] Lawn mower sales and service
2] Plant and tree sales and Christmas tree sales
3] Gasoline sales
4] Deli / convenience store
5] Gift shop

I request from your office a letter stating the current zoning status, the permitted uses and, if applicable, any restrictions on permitted uses. Also, please provide a discussion of the owner's property rights in the event of destruction of the improvements as well as the proper procedure for rebuilding following such an unlikely event.

Pet. #6

Baltimore County
Department of Permits and
Development Management

Permits and Licenses
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
(410) 887-3900
Fax: (410) 887-2824

April 20, 2001

Mr. James Hammond
1517 Applecroft Way
Cockeysville, MD 21030

EXHIBIT D

Dear Mr. Hammond,

RE: Zoning Verification Letter, 11948 Falls Rd.
Cockeysville, MD 21030, 8th Election District

Your letter to Mr. Arnold Jablon, Director of Permits and Development Management, has been referred to me for reply. Based upon the information provided therein and our research of the zoning records, the following has been determined.

The above referenced property is currently zoned RC 4 (Watershed Protection) as per Baltimore County Zoning Map # NW 15D. Included with this response is a copy of a portion of said map

Current uses allowed on the property are as permitted and restricted by the decision of the Zoning Commissioner for Baltimore County in Case No. 89-204 SPH. Specifically, the Commissioner approved the following non-conforming uses on said property, *country store, food and grocery sales, deli operation, household hardware and lawn mower sales and service with plant and tree sales, Christmas tree sales, and accessory lawn and garden supplies and equipment for sale.* Gasoline sales is not included on the list of approved non-conforming uses.

Pursuant to Section 104.2 of the BCZR, which addresses non-conforming uses, a structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged.

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

Sincerely,

Lloyd T. Moxley
Planner II, Zoning Review

LTM:ltm

Printed with Soybean Ink
on Recycled Paper

PHOTOS

PET EX

#7A-O



Per. 7A


CERIES
• EGGS
DELI
SOLINE

Rev. 7B



Pl. 7c



Per 7D



Per 7E



Per. 7F



Per. 74

(3)

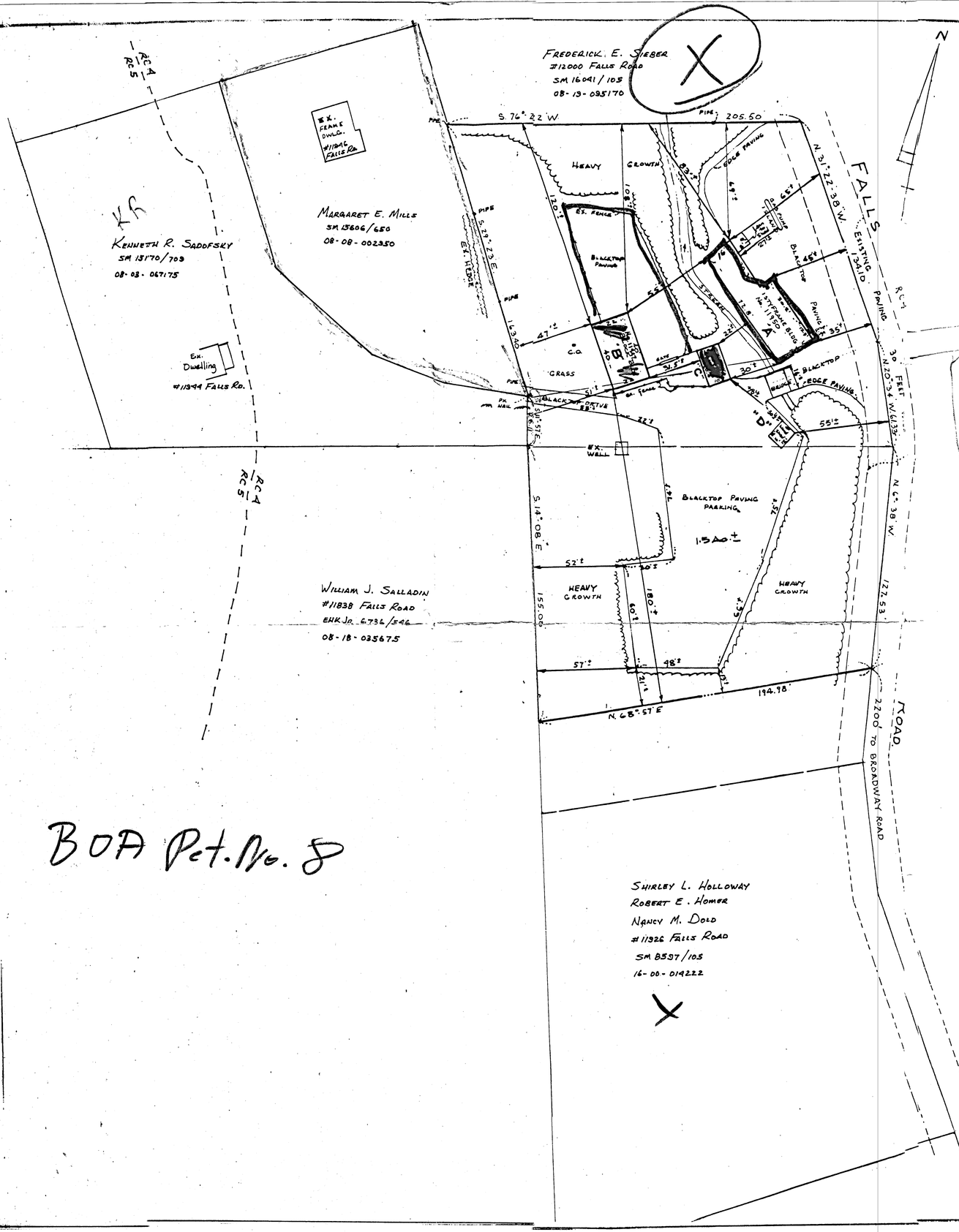


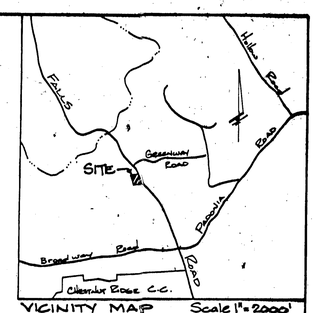
Pl. 7H

(5)



Pg. 71





IN RE: PETITION FOR SPECIAL HEARING * BEFORE THE
W/S Falls Road, 2200'± NW of c/l Broadway Road * ZONING COMMISSIONER
(11943 & 11950 Falls Road)
3rd Councilmanic District * OF BALTIMORE COUNTY
8th Election District *
Legal Owner: Robert Dold, * CASE # 89-204 SPH
Contract Purchaser:
Dennis Peddy *

****

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 27th day of November 1988 that the Petition for Special Hearing to approve a nonconforming use for a Country Store, with Food and Grocery sales and Deli operation, Household Hardware, and Lawn Mower Sales and Service with Plant and Tree Sales, Christmas Tree Sales and Accessory Lawn and Garden Supplies and Equipment for sale, not including contractors or construction companies, landscaping or trucking operation, on an automobile service garage, as indicated on Petitioner's Exhibit 1, which shall become the final Development Plan and final site plan, be and the same is hereby GRANTED.

J. Robert Haines
J. ROBERT HAINES
ZONING COMMISSIONER OF
BALTIMORE COUNTY

GENERAL NOTES

1) OWNER: JAMES G. HAMMOND
1517 APPLECROFT LANE
COCKEYSVILLE, MD 21030

2) TAX ACCOUNT NUMBER / ACREAGE / DEED REFERENCE:
19-00-004961 0.6515 ACRES SM 16215 / 210
08-10-046002 0.846 ACRES SM 16215 / 210
08-10-046003 0.16 ACRES SM 16215 / 210

3) TAX MAP 50 GRID 24 PARCELS 304, 297 & 267

3) THE BOUNDARY AND THE IMPROVEMENTS SHOWN HEREON ARE FROM A SURVEY BY GERHOLD, CROSS & ETZEL, LTD.

4) THE SUBJECT PROPERTY IS ZONED RC 4

5) 200' SCALE ZONING MAP NO. NW 15 D

6) THE SITE IS SERVICES BY WELL AND SEPTIC

7) THIS SITE IS NOT IN THE CHESAPEAKE BAY CRITICAL AREA

8) BUILDING USES (EXISTING / PROPOSED):
BUILDING A – COUNTRY STORE, GROCERY & GASOLINE SALES / SAME
BUILDING B – STORAGE / LAWN AND GARDEN EQUIPMENT SALES AND SERVICE
GARDEN CENTER AND CHRISTMAS TREE SALES
BUILDING C – STORAGE / LAWN AND GARDEN EQUIPMENT SERVICE AND STORAGE
BUILDING D – STORAGE / SAME

9) PRIOR ZONING CASES: 89-204 SPH (ORDER ATTACHED)
94-14 SPH (ORDER ATTACHED)

IN RE: PETITION FOR SPECIAL HEARING * BEFORE THE
W/S Falls Road, 2200 ft. NW of c/l Broadway Road * ZONING COMMISSIONER
11950 Falls Road
8th Election District * OF BALTIMORE COUNTY
3rd Councilmanic District
Legal Owner: Robert E. Dold * CASE # 94-14-SPH
Lessee: Dennis Peddy
Petitioner *

****

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County this 13th day of August 1993 that, pursuant to the Petition for Special Hearing, approval to permit the addition of a barber shop, as a permitted use, within the existing facility known as the Ridge Store, and to amend the special hearing granted in case No. 89-204-SPH, in accordance with Petitioner's Exhibit No. 1, be and is hereby GRANTED.

1. The Petitioner is hereby made aware that proceeding at this time is at its own risk until such time as the 30 day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the Petitioner would be required to return, and be responsible for returning, said property to its original condition.

Lawrence E. Schmidt
LAWRENCE E. SCHMIDT
Zoning Commissioner for
Baltimore County

PLAT TO ACCOMPANY A PETITION FOR A SPECIAL HEARING

TO CLARIFY THAT LAWN AND GARDEN EQUIPMENT SALES AND SERVICE ARE ALLOWED, WITH SERVICE NOT BEING LIMITED TO PRODUCTS SOLD ON SITE

#11943 & #11950 FALLS ROAD
8th ELECTION DISTRICT, 3RD COUNCILMANIC DISTRICT
BALTIMORE COUNTY, MARYLAND

SCALE: 1" = 30' DATE: JAN. 30, 2003

GERHOLD, CROSS & ETZEL
REGISTERED PROFESSIONAL LAND SURVEYORS
Suite 100
320 East Towsontown Boulevard
Towson, Maryland 21286
(410) 823-4470

BOA Pet. No. 8

Pet. #9

Exhibit F

June 9, 2003

DRAFT – FOR REVIEW PURPOSES

RESTRICTIONS TO BE IMPOSED BY BALTIMORE COUNTY BOARD OF APPEALS, 11943 AND 11950 FALLS ROAD

1. Clarification of uses permitted and prohibited:

A. Lawn and Garden Equipment. Lawn mowers, chain saws, weed eaters, leaf blowers, snow blowers, tillers, home generators and related outdoor power equipment shall be allowed to be sold and serviced

C. Hours of Service Operation. No service operation which involves the use of equipment which makes an audible noise (i.e., air compressor, power wrenches, etc.) shall be used on the property except during the following hours:

(i) Monday – Friday, 8 a.m. to 5 p.m.

(ii) Saturday - 9 a.m. to 4 p.m.

B. Mulch. Mulch in bags shall be allowed to be sold. No loose mulch shall be allowed to be sold.

C. Vehicles. No vehicles, whether tagged or not, shall be stored on the property. The only vehicles permitted to be on the property shall be customers and owners and employees.

D. Other Uses. In all respects the decision of the Zoning Commissioner dated November 30, 1988 is confirmed, including specifically the prohibition on "contractors or construction companies, landscaping or trucking operation or an automobile service garage".

2. Modifications to the property: Within one hundred and eighty days of the date of the order, Petitioner shall complete the following modifications to the property, and shall have obtained the approval of the County Planning Department that the modifications have been performed in accordance with this order:

A. The frontage of the property along Falls Road south of the driveway shall be screened by evergreen trees or shrubs so as to shield the property from view by property owners on the east side of Falls Road;

Pet Ex # 10

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
John Hanks	16835 Gerting Rd.	3/15/03
Faith Nelvins	16835 Gerting Rd.	3/15/03
	12101 Falls Rd	3/15/03
	1525 Applecroft Lane	3/15/03
	14 Hickory Meadows Rd	3/15/03
	14006 Fall Road Cockeysville	3/17/03
Judith Madam Burger	35 Hickory Meadows Rd Hunt Valley 21030	3/17/03
	11736 Greenspring Ave	3/17/03
William A. Orange Sr	1419 White Hall Rd.	3/17/03
William Freeland	1825 Petty Hill Rd	3/17/03
Margaret S. Mills	11946 Falls Rd	3.17.03
Maurice E Davis III	2424 Walnut Ave	3/17/03
Drew Steele	12 Dellwood Ct	3/18/03
Michael Bayer	1300 Musgrove Rd	3/18/03
Sheila Bertoldi	12419 Falls Rd	3/18/03
Ellen B Jarrett	1325 Chippendale Rd	3/18/03
C.J. Kaminaris	1904 Shawan Valley Lane	3/18/03

Pet. #11

Falls Road Community Association

P.O. Box 555 Brooklandville, Maryland 21022

ESTABLISHED
1947

December 13, 2002

James Hammond
1517 Applecroft Lane
Cockeysville, Maryland 21030-1601

Re: 11950 Falls Road

Dear Mr. Hammond:

I understand from records of the Maryland State Department that you own the above-referenced property, commonly known as the Ridge Store. As you know, the only business activities permitted on that property are those identified as non-conforming uses by the Zoning Commissioner of Baltimore County in cases #89-204 SPH and 94-14 SPH. Recently, however, the FRCA has learned that business activities in excess of those permitted by the Zoning Commissioner may be occurring or planned for the property. The FRCA is especially concerned with any action that might harm the stream on or adjacent to the property, such as, increasing vehicle use on or paving more of the property.

Accordingly, after you have had an opportunity to review the opinions of the Zoning Commissioner, I would appreciate if you would give me your written assurance that all business activities on the property are permitted non-conforming uses and that you will not allow any business activities on the property that are not permitted non-conforming uses.

Thank you for your attention in this matter.

Very truly yours,

Harold H. Burns, Jr.,
President

cc: Officers and Directors,
Falls Road Community Association

Reply to: Suite 201, 210 East Lexington Street, Baltimore, Maryland 21202-3514
410-528-0044, Fax: 410-576-7610, E-Mail: burnsesq@clark.net

RIDGE COUNTRY STORE 4103083670 P.1

Pet Ex #4 12

Margaret E. Mills
11946 Falls Road
Cockeysville, MD 21030

410-308-0440

March 18, 2003

To Whom it May Concern,

My property directly adjoins that of Mr. James Hammond. I am in support of his continued operation at 11942 Falls Road .

Although we share a driveway and a property line, his presence at this location has not negatively impacted me since his arrival.

Mr. Hammond continuously proves himself to be a good neighbor. He has made improvements to the store, continues to clear the property, and is enthusiastic about sharing his plans for future renovations. He is generous with his time and assistance, particularly during the recent snow storms. Mr. Hammond is a friendly, courteous, and polite individual.

To make Mr. Hammond cease the way in which he does business would deprive him of his ability to earn an income. Such a hardship could necessitate Mr. Hammond's departure and leave that property empty for a considerable amount of time until a new buyer is found. Certainly everyone is aware of the dangers such a condition could bring about.

Improvements take time and I ask that Mr. Hammond be allowed to continue with his business plan which includes further cosmetic upgrades. Ultimately this is a better proposition for all of his neighbors.

Sincerely,

Margaret E. Mills

Margaret E. Mills

Pet. # 13

June 24, 2003

Statement of William Sprecher

My name is William Sprecher. I live at 12401 Falls Road. I had intended to attend the hearing on June 25 regarding Jim Hammond's appeal but I am due to have surgery on my foot that morning at GBMC.

My father operated the store for about 17 years from the late 1950's up through the l970s. During that time and for years after I was a customer of Dold's Lawn Mower Sales and Service.

Dold's sold new lawn mowers and repaired lawn and garden equipment of many types. I recall they had a dealership for Arens riding mowers. They repaired any piece of lawn and garden equipment anyone brought to them, and there was never any restriction to equipment purchased at the property. They had trailers deliver mowers to them and they used trailers to pick up equipment.

William E. Sprecher

William Sprecher

~~Pet~~ Prot. # 1

THE FALLS ROAD COMMUNITY ASSOCIATION, INC.

The undersigned hereby acknowledge and attest that the Board of Directors of The Falls Road Community Association, Inc., a Maryland corporation (the "Corporation"), in accordance with Section 2-408 of the Maryland Corporations and Associations Code, do hereby take the actions below set forth, and to evidence their waiver of any right to dissent from such actions, do hereby consent as follows:

RESOLVED: The Falls Road Community Association, Inc. opposes the Petition for Special Hearing of James M. Hammond, concerning 11942 & 11950 Falls Road, before the Board of Appeals of Baltimore County in # 03-366-SPH.

RESOLVED: Ken Sadofsky, Dan Meenan, and David Suarez, who are duly elected members of the Board of Directors of the Falls Road Community Association, Inc., shall attend the hearing on June 25, 2003 before the Board of Appeals of Baltimore County in # 03-366-SPH and testify in opposition to said petition.

AS WITNESS OUR HANDS THIS 12th day of June, 2003.

ATTEST:

By: Dennis Sutton
Dennis Sutton, Secretary

The Falls Road Community Association, Inc.

By:
John A. Galbreath, President

AFFIDAVIT

I hereby swear upon penalty of perjury that Ken Sadofsky, Dan Meenan, and David Suarez are duly elected members of the Board of Directors of the Falls Road Community Association, Inc.

ATTEST:

By: Dennis Sutton
Dennis Sutton, Secretary

The Falls Road Community Association, Inc.

By:
John A. Galbreath, President

Baltimore County Zoning Commissioner
Office of Planning
Suite 405, County Courts Bldg.
401 Bosley Avenue
Towson, Maryland 21204

Protestants #9
Exhibit #
#03-366-SPH
(3/20/03)

Printed with Soybean Ink



~~3/14/03~~
3/16/03

(16)


Prot Ex 2

3/14/05



3/14/03


ZONING NOTICE

~~3/14/03~~
3/16/03

(3)


ZONING NOTICE

~~3/14/03~~
3/16/03

(4)


NO PARKING
IN
DRIVEWAY

~~3/14/03~~
3/16/03

(5)



~~3/14/03~~

3/16/03



~~3/14/03~~
3/16/03

(7)



~~3/14/03~~

3/16/03



~~3/14/03~~
3/16/03

(9)



~~2/14/03~~

3/16/23

(10)



~~3/14/03~~
3/16/03

(11)



~~3/14/03~~
3/16/03

(12)



3/16/03



3/14/23
3/16/23



~~3/14/03~~
3/16/03

(15)

IN THE MATTER OF:	* BEFORE THE
THE APPLICATION OF	* COUNTY BOARD OF APPEALS
JAMES G. HAMMOND - LEGAL OWNER/	* OF
PETITIONER FOR A SPECIAL HEARING	* BALTIMORE COUNTY
ON PROPERTY LOCATED ON THE W/SIDE	* Case No. 03-366-SPH
OF FALLS ROAD, 2,200' NORTH OF	* June 25, 2003
BROADWAY ROAD (11942 and 11950	*
Falls Road)	*
8th ELECTION DISTRICT	*
3rd 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 25, 2003.

* * * * *

ORIGINAL

Reported by:

C.E. Peatt

TOWSON REPORTING COMPANY
600 Baltimore Avenue, Suite 201, Towson, Maryland 21204
(24 Hrs./7 Days)
410-828-4148 • 800-734-5292
Affiliated With Gore Brothers Reporting & Video Company, Inc.

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

IN THE MATTER OF:

JAMES G. HAMOND, PETITIONER

11942 and 11950 FALLS ROAD

_____/

November 5, 2003

BEFORE:

LAWRENCE M. STAHL, Chairman

CHARLES L. MARKS, Board Member

MARGARET WORRALL, Board Member Maryland

APPEARANCES:

JOHN C. MURPHY, ESQUIRE
On behalf of Petitioner

ALSO PRESENT:

BARBARA JUNG

KEN SADOFSKY

KIM DETRICK

Reported by: Charles H. Long

GORE BROTHERS
Reporting & Video Company, Inc.
Since 1961 – Serving MD, D.C. & No. VA
115 W. Mulberry Street • Baltimore, MD 21201
(24 Hrs./7 Days) 410-837-3027 • 800-734-5292
Towson Reporting Co. ✦ Baltimore Video/Conferencing Center, Inc.

IN THE MATTER OF:	*	BEFORE THE
JAMES G. HAMMOND -	*	COUNTY BOARD OF APPEALS
Petitioner	*	OF
11942 and 11950 Falls Road	*	BALTIMORE COUNTY
8th Election District	*	CASE NO. CBA-06-010
3rd Councilmanic District	*	February 28, 2006
	*	

* * * * *

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., February 28, 2006.

* * * * *

ORIGINAL

Reported by:

C.E. Peatt

Pet Ex #3

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
[illegible]	1683 Gerting Rd.	3/15/03
Faith Nevins	16835 Gerting Rd	3/15/03
[illegible]	12101 Falls Rd	3/15/03
[illegible]	152 Applecroft Lane	3/16/03
[illegible]	14 Hickory Meadows Rd	3/15/03
[illegible]	14006 Fall Road Cockeysville	3/17/03
Judith Mysam Burger	35 Hickory Meadow Rd Hunt Valley 21030	3/17/03
[illegible]	11736 Greenspring Ave	3/17/03
William A. Ormsby Sr	1419 White Hall Rd.	3/17/03
[illegible]	1825 Petty Hill Rd	3/17/03
Margaret F. Mills	11946 Falls Rd	3.17.03
Maurice E Perry III	2424 Walnut Ave	3/17/03
Drew Steele	12 Dellwood Ct	3/18/03
Michael Bayer	1306 Muscrove Ld	3/18/03
Sheila Bertold	12419 Falls Rd	3/18/03
Ellen B Jarrett	1325 Chippendale Rd	3/18/03
C.J. Kaminaris	1904 Shawan Valley Lane	3/18/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
Francis X Kelly	1518 Applecroft Ln	3/12/03
Janet A. Kelly	lr	3/12/03
Carter Knipp	21 Hickory Meadow Rd	3/15/03
Colleen Knipp	21 Hickory Meadow Rd	3/15/03
Guy NAYLOR	14324A Cuba Road	3/15/03
Phyllis Bertolini	12414 Falls Road	3/15/03
Mike SHAFFER	1 Ronnie Acres	3/15/03
[illegible]	762 Houcksville Rd.	3/15/03
[illegible]	13005 Red Maple Dr	3-15-03
[illegible]	13014 Red Maple Dr	3/15/03
[illegible]	6913 Kenbrook Rd	3/15/03
[illegible]	13224 Ridge Rd	3/15/03
[illegible]	3-N BREEZYNK CT	3/15/03
[illegible]	12402 Falls Road	3/15/03
[illegible]	3 JONATHANS CT	3/15/03
[illegible]	823 w. Padonia Rd.	3/15/03
Mary E. McCarthy	823 w. Padonia Rd	3/15/03
John Schaffer	701 Morris Ave	3/15/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
Carol Kakol	12006 Baxer Hill Rd	3/4/03
Sue Myers	1110 Justa Lane	3/4/03
William E Fritch	1138 Greenway RD	3/7/03
Cindy Brady	12007 Baxter Hill	3/7/03
Laura Koons	1114 Justa Lane	3/7/03
[illegible]	2213 [illegible]	3/7/03
W.T. Fogle	1107 Greenway Rd	3/9/03
Linda Fogle	1107 Greenway Rd	3/9/03
Dermod Reid	9621 Labrador Ln	03.09.03
Wesley D Myers	1110 Justa Lane	3/9/03
Richard Koons	1114 Justa La	3-13-03
Rose A. Sokolow	11616 Kelley Ave	3/14/03
Jake C. Bokoloff	11616 Kelley Ave	3/14/03
Andy Bond	9615 Labrador Ln	3/16/03
Ann Bond	9615 Labrador Ln	3/16/03
George Getschel	12008 Baxer Hill Rd	3/16/03

2030

4

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
C E Bantz	2825 Benson Mill Rd	3/10/03
B Pearlstein	13009 Gerk Rd	3/10/03
Gordon Cooke	17 Hickory Meadow Ct	3/10/03
Ingrid Weir	12000 Falls Rd	3/10/03
Kathy Hutchison	303 Sunshine Place #K 21208	3/10/03
Mary Lou Mansfield	13821 Falls Road	3/10/03
Robert W. Keller	12148 Falls Road	3/10/03
Daisy Gutberlet	Falls Rd Brooklandville	3-10-03
[illegible]	13065 Shawn Circle	3/11/03
Peter Goff	2 Winchester Ct 21136	3/11/03
Robert Pattent	5 Summit Green Ct	3/11/03
John V. Eller III	4101 Black Rock Rd.	2/4/03
F. J. Gradwohl	14016 Falls Rd Hydes Md.	3/4/03
Stephanie Murphy	19 Chris Eliot Ct.	3/11/03
Gail Powell	12134 Falls Rd	3-12-03
CHRIS HAMPSON	1902 SHAWAN VALLEY LN	3/12/03
Mark Pickering	921 Lucas Switch	3/12/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
Mark Brennan	14 Hickory Meadow Ct.	Mar 12,
Anne Winters	2107 owlen farm ct	Mar 12
Theresa Brungardt	2720 Aspen Dr.	3/12/03
[illegible]	6 Wayken Ct	3/12/03
Mace	11831 Falls Rd	3/13/03
Kathy Metcalf	311 Jance Way	3-13-03
Jim Berger	Sykesville	3-13-03
Patty Gallagher	11613 Bill Point Cir	3/13/03
Colleen Gallagher	"	"
L. J. Link Jr.	18415 S. O. Parkington	21074. 3.13.03.
[illegible]	1517 Ivy Hill Rd	3.13.03
Bill Ley	9 Bucwood Farm Ct Reisterstown	3-13-03
Jon Hawkins	61 Ivy Brook Farm Ct	3-13-03
[illegible]	237 St. Thomas Lane	3-13-03
Joe Boucher	12135 Falls Rd	3/13/03
Robin Miller	3 Deep Run Ct.	3/14/03
Mark Fulchino	1508 Appleno Path	3/14/03
[illegible]	6 Jonathan Sect	3/14/03.

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
Michael Hansen	1001 Ivy Hill Rd, Cockeysville	3/6/03
Bruce Stein	1921 Ridge Rd Reisterstown	3/6/03
DENNIS HART	1515 HILLCROFT	3/6/03
Cal Powell	2009 Pinecrest Dr.	3/7/03
[illegible]	[illegible]	[illegible]
[illegible]	13 Fernwood Ct.	3/7/03
Judy Hose	1983 Rickert Rd.	3/7/03
Derek Ehman	20 Hickory Meadow	3/7/03
[illegible]	[illegible]	3/8/03
Paul Beckham	11541 ST DAVIDS Lane	3/7/03
Dena Gallagher	1903 Billy Boulder Cr	3-8-03
Wink Unger	5 Fawn Ridge Ct.	3/8/03
Ken Grady	1300 Ivy Hill Rd	3/9/03
Peter Steele	12 Dellwood Ct.	3/9/03
KATIE CARMAN	11913 MANJON DR.	3/9/03
Gary Leaverton	23 Dellwood Ct	3/9/03
[illegible]	1301 East Rd	3/10/03
David P McQuaid	2000 Belfast Ln	3/10/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
FLOYD POND	3 CORMAC CT #213	3/5/03
KATHLEEN POND	" " "	"
Tim Arnyton	1505 Applecroft Ln	3/5/03
Dan Carpenter	16005 Dark Hollow	3/5/03
Chuck Fuller	3412 Millieway Manchester	3/5/03
BOB GERALD	11526 FALLS RD	3-5-03
Michael Bass	12047 Falls Road	3.5 03
Debbie Todd	P.O. Box 523 Monkton Md.	3-5-03
Ever MINDEL	3 Rises CT 21030	3/5/03
Lee-Hughes	11835 Falls Rd 21030	3/5/03
Kathy Kroll	9103 Fox Trail Ct 21136	3/5/03
Ned Stellmacher	12014 Bunker Hill Rd	3/5/03
Karen Mackin	11801 Rockybrook dam Rd	3/5/03
Kim Burton	12911 Glenn Rd. 21136	3/5/03
Dolores Asiroth	16620 CEDAR GROVE 21152	3/5/03
Kim Brock	15324 Falls Road	3/5/03
Glenn Ercole	7 Quail Crossing	3/6/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
[illegible]	5 Huntsman Ct	3.3.03
Paul Bennett	12017 Fallsroad	3-3-03
Robert Kelly	1 Kings Court	3-3-03
Carol P Ryther	3 JOEL CT	3-3-03
Jeffrey T Burke	7 Deer Creek Ct.	3-4-03
Tom Grossmyer	Falls RD	3-4-03
Mary Hoffman	12325 Falls Rd	3-4-03
Bob Hoffman	Ikey Seminary	3-4-03
Debbie Stellmann	3040 Black Rock	3/4/03
Dan Hauge	7 Conway Ct	3/4/03
Charles Stellmann	2000 GEIST Ct.	3/4/03
Joseph Scott	1120 ARRAN RD	3/4/03
Wesley Hartless	11831 Falls RD	3/4/03
[illegible]	2750 Butler Road	3/5/03
Nelson N. Alberto	12165 Falls RD	3/4/03
Phyllis Debra Kaser	1101 Broadway	3/4/03
Ellen Feagle	1504 Broadway	3/4/03
[illegible]	5 Hickory Hill Rd	3-4-03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
	2 Risis Ct. 21030	2/28/03
LARRY MACE	11831 Falls Rd 21030	2/28/03
Martin Hammond	11926 FALLS	2-28-03
Christine Powell	1 Quail Covey Ct	2-28-03
Wesley Hammond	1123 Greenway Rd	3-1-03
R T Lam	23 Dellwood Ct	2-28-03
Dan Daugherty Jr.	12 Hickory Meadow Rd	3-1-03
[illegible]	12805 Gent Rd	3-1-03
[illegible]	14017 Cuba Rd	3-1-03
Bob Johnston	2733 Baublitz R.	3-1-03
Pete Bauer	4 Deep Run Ct	3/1/03
Tom Grosso	21061 Glenbrook Rd	3/1/03
Wesley D. Fish	15131 Heathers Hill Ln	3/1/03
Donna Steele	12 Dellwood Ct.	3/1/03
[illegible]	1139 Greenway Rd.	3/3/03
[illegible]	16525 Cuba Rd	3/3/03
Tom Lonergan	1911 Billy Baker Cir	3/3/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
[illegible]	12825 FALLS RD	3/3/03
D. BROWN	2409 GADA RD.	"
[illegible]	14411 FALLS ROAD	3/03/03
Judy Gruetter	1139 Greenway Rd.	3/3/03
[illegible]	600 Billy Billingsley	3/3/03
[illegible]	6400 Stevenson Valley Court	3/3/03
[illegible]	6300 Falls Rd	3-3-03
[illegible]	12 Deer Creek Ct.	3-3-03
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	835 Chippendale Rd	3-3-03
[illegible]	11946 Falls Rd	3-3-03
[redacted]	[redacted]	
DOUG LANE	11 MANSER DR.	3/3/03
[illegible]	2501 Taylor Ave	3/3/03
[illegible]	2011 Blockrock Rd	3/3/03
[illegible]	13011 Gunpowder Rd	3/3/03
[illegible]	12004 Boxer Hill RD	3/3/03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
Johnnie Ramsey	11911 Falls Rd	3-19-03

PETITION IN SUPPORT OF LAWN AND GARDEN EQUIPMENT REPAIR AT 11942 & 11950 FALLS ROAD

TO THE BALTIMORE COUNTY ZONING COMMISSIONER
CASE: 03-366

I support the request for James Hammond to repair new and used lawn and garden equipment at 11942 and 11950 Falls Road:

Name	Address	Date
ROBIN SCHACHAT	1516 HEATHER HILL 21030	3/19/03
Michael Freili	13004 Falls Rd 21030	3/19/03

Pet Ex #4

M

Margaret E. Mills
11946 Falls Road
Cockeysville, MD 21030
410-308-0440

March 18, 2003

To Whom it May Concern,

My property directly adjoins that of Mr. James Hammond. I am in support of his continued operation at 11942 Falls Road .

Although we share a driveway and a property line, his presence at this location has not negatively impacted me since his arrival.

Mr. Hammond continuously proves himself to be a good neighbor. He has made improvements to the store, continues to clear the property, and is enthusiastic about sharing his plans for future renovations. He is generous with his time and assistance, particularly during the recent snow storms. Mr. Hammond is a friendly, courteous, and polite individual.

To make Mr. Hammond cease the way in which he does business would deprive him of his ability to earn an income. Such a hardship could necessitate Mr. Hammond's departure and leave that property empty for a considerable amount of time until a new buyer is found. Certainly everyone is aware of the dangers such a condition could bring about.

Improvements take time and I ask that Mr. Hammond be allowed to continue with his business plan which includes further cosmetic upgrades. Ultimately this is a better proposition for all of his neighbors.

Sincerely,

Margaret E. Mills

Margaret E. Mills

Ref by #5

JAN 17, 2003

From Iver Mindel
3 Rises CT
Cockeysville, Md. 21030
410-252-7110

Dear Sirs,

Enclosed find my check for $40 in support of FRCA. I have lived at my current address since 1975, and have supported the FRCA in its work . I also attended the fine dinner this past fall at Oregon Ridge.

For the most part I support FRCA policy, however I believe in a current situation FRCA is somewhat misguided. It seems that a certain James Hammond is trying to revive the business of small engine repair at the Ridge Store located on Falls Road just north of Padonia. When I moved here in the 1970's, the Dold Family had long been operating just such an enterprise, and continued to do so for many years. I found the service unobtrusive, and useful. I do not see why FRCA is objecting to the re-establishment of such an enterprise.

It is one matter for FRCA to try to curtail major development projects, or the building of an eight-story office complex at the bottom of Falls road at Windy Valley. But it seems rather petty of FRCA to object to a minor business in an appropriate location, a business that has co-existed with the community for years. Perhaps FRCA would rather see the business fail, and the property become derelict, and an eye-sore, detracting from property values..

Rises CT consists of a seven member home owners association, all of whom support FRCA and many of us attended the fall dinner at Oregon Ridge together. At a meeting held on January 5, 2003, we discussed the situation, and we were unanimous in our support of Mr. Hammond's right to continue the running of a small engine repair shop without restrictions or conditions. Since Rises CT is adjacent to the property, we are the ones who would be most affected, and we have no problem with such a repair shop.

One "rumor" that was discussed at the meeting was that one of the FRCA board members actually lived on the hill behind the shop, and that this board member was spearheading the opposition to the small engine shop because of his own personal feelings. I do not know if this "rumor" is true or not, but it would not reflect well on FRCA if there was even a shred of truth to it.

In short, I will continue to support the FRCA as long as its energies are directed to the major problems that affect the Falls Road area. At the same time, I will be reluctant to support an organization that appears to harass every landowner or small business entrepreneur that does not give in to what appears to be every petty objection raised by FRCA.

I will be glad to discuss this matter with any board member, and await a phone call at the above number. My concerns are considerable about the direction that FRCA appears to be taking with their stand on this matter.

Sincerely yours,

Iver Mindel

Ex # 6

James G Hanmond
1517 Applecroft Lane
Cockeysville, Md 21030
(410)252-0782 Aft 6:00 pm

May 17, 2001

Baltimore County Department of
Permits and Development Management
ATTN.: Lloyd T Moxley
Planner II, Zoning Review
County Office Building
111 West Chesapeake Avenue
Towson, Md 21204

RE: Zoning Verifciation Letter 11948 Falls Road
Cockeysville, Md 21030, 8th Election District

Dear Mr Moxley:

As per your conversation with Mrs Dold, and the enclosed letter sent to me dated April 20, 2001, we would like to request that gasoline sales be included as part of the nonconforming use. It is not my intention to expand or make the gasoline sales the primary business but an integral part of the Ridge Country Store & Deli. The gasoline sales help draw customers.

The loss of this use would make the property unacceptable for my use. I thank you for your time and consideration and I await the results of your findings. My telephone number is (410)252-0782..

Sincerely,

James G Hammond

PAC:ah

Pet Ex #7

Baltimore County
Department of Permits and
Development Management

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

June 11, 2001

Mr. James Hammond
1517 Applecroft Way
Cockeysville, MD 21030

Dear Mr. Hammond,

RE: Zoning Verification Letter, 11948 Falls Rd.
Cockeysville, MD 21030, 8th Election District

Based upon my telephone conversation with Mrs. Dold describing the current extent of gasoline sales on the above-referenced property and your letter dated May 17, 2001 clarifying your future intentions regarding same the following has been determined.

It is the opinion of this office that the gasoline sales as described in the "Findings of Fact and Conclusions of Law" in Zoning Case No. 89-204 SPH may continue at it's current capacity as an ancillary part of the legal non-conforming commercial uses on the property.

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

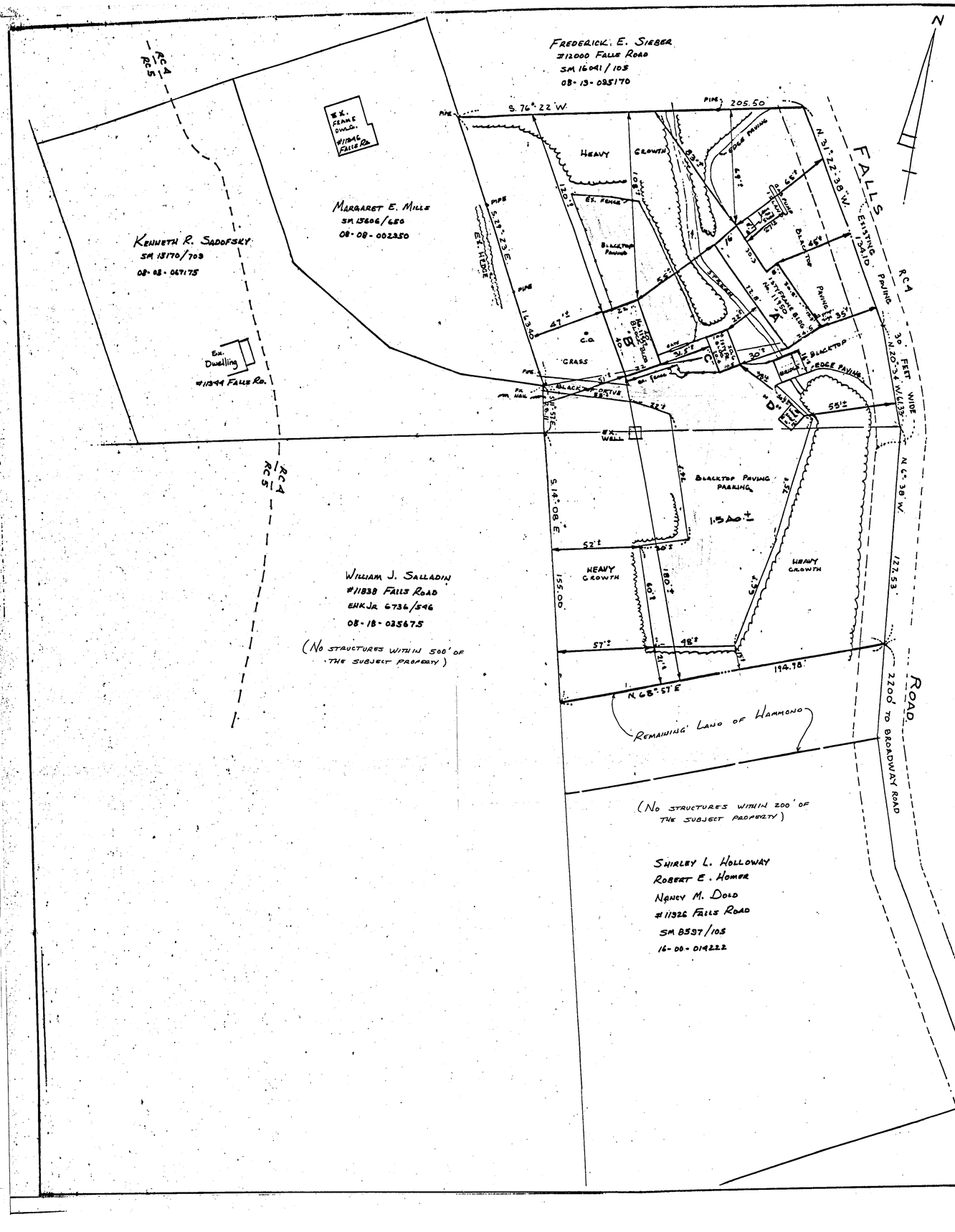
Sincerely,

Lloyd T. Moxley
Planner II, Zoning Review

LTM:ltm

Printed with Soybean Ink on Recycled Paper

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


FREDERICK E. SIEBER
#12000 FALLS ROAD
SM 16041/105
08-13-035170
EX. FRAME DWLG. #11946 FALLS RD.
MARGARET E. MILLS
SM 13606/650
08-08-002350
KENNETH R. SADOFSKY
SM 15170/703
08-08-047175
EX. Dwelling #11944 FALLS RD.
WILLIAM J. SALLADIN
#11838 FALLS ROAD
EHKJR 6736/546
08-18-035675
(NO STRUCTURES WITHIN 500' OF THE SUBJECT PROPERTY)
SHIRLEY L. HOLLOWAY
ROBERT E. HOMER
NANCY M. DOLD
#11926 FALLS ROAD
SM 8537/105
16-00-014222
(NO STRUCTURES WITHIN 200' OF THE SUBJECT PROPERTY)
REMAINING LAND OF HAMMOND
FALLS ROAD
EXISTING 34'D PAVING
30' FEET WIDE
RC 4
RC 5
S. 76° 22' W.
205.50
N 31° 22' 38" W.
N 20° 34' W. 132'
N 6° 38' W. 122.53'
S 14° 08' E.
155.00'
N 68° 57' E
194.78'
1.540 ± AC.
BLACKTOP PAVING PARKING
HEAVY GROWTH
EX. FENCE
EX. HEDGE
EX. WELL
BLACKTOP DRIVE
EDGE PAVING
CRUSHED STONE
GRASS
BUILDING A
BUILDING B
BUILDING C
BUILDING D
EX. SHED
EX. GAZEBO
EX. GARAGE
EX. SHED
EX. GREENHOUSE
EX. SHED
EX. GARAGE
EX. SHED
EX. GARAGE
EX. SHED
EX. GARAG