IN RE: PETITION FOR SPECIAL EXCEPTION and SPECIAL HEARING 400 Grey Rock Road (Grey Rock Mansion)	*	
	*	BEFORE THE
	*	OFFICE OF
Grey Rock Properties, LLC et al. Petitioners/*Legal Owners*	*	ADMINISTRATIVE
	*	HEARINGS
	*	FOR
	*	BALTIMORE COUNTY
	*	Case nos.: 21-0273-SPHX
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POST-HEARING MEMORANDUM

Protestants, Grey Rock Maintenance Corporation, Grey Rock Flats Condominium Association, and Grey Rock Villas Association, submit this post-hearing memorandum in support of their opposition to the petition for special exception and petition for special hearing filed by Petitioners, Grey Rock Properties, LLC, Brian Pomykala, and Ronald Pomykala.

I. The PETITION FOR SPECIAL EXCEPTION

Petitioners seek a special exception for a living quarters in a commercial building, as provided in section 236.2 of the Zoning Regulations (BCZR). Petitioners propose to convert 1000 square feet on the second floor of the mansion building to a "caretaker's apartment." The specifics of the use, and the need for such living quarters, were less than crystalline.

Mr. Schmidt proffered that the apartment would consist of a bedroom, living area, bathroom, and a small kitchen. The purpose of having a living quarters is two-fold: (1) to

have someone present on site for security reasons or if there was a fire or other emergency, and (2) so that the person can perform minor maintenance and repairs on the mansion if necessary. As Mr. Pomykala explained, the caretaker would not perform larger maintenance or repairs – contractors would still be called for such jobs – but rather would do "small odds and ends, handyman tasks." The caretaker would not be responsible for clean-up after events at the mansion, again, contractors would still be necessary for that. Mr. Pomykala acknowledged that there has not been any break-ins or vandalism at the mansion.

Mr. Schmidt proffered that Petitioner Brian Pomykala may be the caretaker and live in the apartment or Petitioners decide to may hire someone else to do so. In either event, the apartment would be occupied by only one caretaker, but the possibility exists that a spouse of the caretaker could live there as well. Mr. Pomykala acknowledged that having a spouse live there was not necessary.

At the hearing, Protestants expressed their concerns regarding living quarters at the mansion. They questioned the need for a caretaker when the same work could be performed by someone who did not live there, as evidenced by the fact that the catering facility has been around for decades without the need for such a person. They expressed their concern that living quarters would change the character of the area and their fear, given their short but troubled history with the Petitioners, that they would expand the living quarters beyond what was proposed.

Petitioners, for their part, did not introduce any evidence directed to the impacts or lack of impacts that would result from a caretaker's apartment in the mansion. Petitioners also did not address the special exception standard in the common law or under section 502.1 of the BCZR. Some showing in this regard was required and Petitioners offered none.

Petitioners failed to meet their burden and, therefore, their petition should be denied. *See Attar v. DMS Tollgate, LLC*, 451 Md. 272, 286 (2017) (despite the presumption in favor of a special exception, "'both the burden of production and the burden of persuasion on the issue of whether the special exception should be granted' fall on the applicant....") (*quoting People's Counsel for Baltimore County v. Loyola Coll. of Md.*, 406 Md. 54, 109 (2008)); *Id.* (the applicant "must persuade the Board 'by a preponderance of the evidence that the special exception will conform to all applicable requirements.'").

II. THE PETITION FOR SPECIAL HEARING

The Petition for Special Hearing filed by Petitioner seeks confirmation from the ALJ that the existing commercial meeting facility use[1] at the property and its attendant parking are legal nonconforming uses.

Oddly, during the hearing, Mr. Schmidt initially suggested that, despite what the Petition for Special Hearing says, the catering facility was located exclusively within the BR portion of the property and therefore it was not necessary for Petitioners to establish that the facility was a legal nonconforming use. Indeed, Mr. Schmidt indicated initially he was going to withdraw that aspect of the Petition for Special Hearing seeking confirmation of the catering facility as a legal nonconforming use. (Perhaps Mr. Schmidt was hoping that the ALJ and Protestants would not notice that significant aspects of the facility, in fact, lie within in the DR 3.5 portion of the property, specifically the "tent" structure, the yard area, and its walkways, gazebo, and fountain. And perhaps Mr. Schmidt was hoping the ALJ and

[1] There is no such use as "commercial meeting facility" in the BCZR. The use most resembling Petitioners' use is a "catering hall," which is defined in the BCZR as "[a] facility or part of a facility used regularly for serving beverages and food to groups which reserve the facility for banquets or gatherings before the day of the event. A catering hall is not a standard restaurant." § 101.1.

Protestants would not notice in Petitioners' site plan (Ex. 1) the feint, lightly-lined depiction of the tent structure or that the improvements to the east of the mansion in the DR 3.5 zone are not shown on the site plan).

In any event, as the ALJ noted, those aspects of the catering facility that are located within the DR 3.5 zone may be deemed legal nonconforming uses only if they existed at the time the zoning was changed, in the year 2000, from BM to DR 3.5. The testimony and documentary evidence on this point was as follows:

A. <u>The "Tent" – Per The Testimony of Mr. Clowney and Mr. Schmidt</u>

Mr. Clowney testified that, when he first started working at the property in 1998, there was a tent on the right side of the mansion that had been installed in 1990. That tent did not have any doors, had only string lighting, and no permanent heating or air conditioning; portable units were brought into the tent in the winter and summer months. In 2004, after Mr. Clowney acquired the property, he removed the tent because it had substantial wear and tear and "replaced" it with an "upgraded," "new and improved" structure that has a center chandelier, café lighting, tables, and heating and air conditioning. According to Mr. Clowney, that same structure was located at the mansion from 2004 to 2018 when he sold the property to Petitioners.

B. <u>The "Tent" As Depicted In The Various Plans</u>

1. The 1991 and 1994 plans

The third and fourth plans included in Petitioners' Exhibit 6 are from 1991 and 1994. Importantly, these plans do not show any tent or structure on the eastern side of the mansion building, only the mansion building itself.[2]

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[2] This refutes the testimony of Mr. Clowney, who stated that the tent was installed in 1990.

2. *The 2003 and 2004 plans*

Petitioners' Ex. 7B (Plan to Accompany Special Hearing to Amend Partial FDF for Phase IV) and the first two plans in Petitioners' Ex. 6 are from the years 2003 and 2004. Critically, these plans do not show the structure as it exists today. It shows a smaller, lightly-lined shape (not a square or rectangle) that appears instead to be a *patio* with walkways to the main building and to the parking lot. This patio area is not bold-lined as is the mansion building and does not appear to be connected to the main building.

3. *The 2022 aerial photos (Pets' Ex. 2A, B, and C).*

This series of photographs, taken in January 2022, show a structure, not a patio, that is larger and more square or rectangular uniform in shape than is depicted in the 2003 and 2004 plans (Ex. 6 and 7B) (described above). The structure forms a considerably larger portion of the eastern side of the entire building than the patio shown in the 2003 and 2004 plans and is connected to that main building as opposed to separated by a walkway. The photos also show new walkways to the south and east of that structure that are not present in the 2003 and 2004 plans (Ex. 6 and 7B).

4. *The Site Plan in this case (Pets' Ex. 1)*

The site plan filed by Petitioners in this case shows, ambiguously, a rectangular box on the eastern side of the mansion building. It appears to be connected to the mansion building, but it is lightly-lined, not bold-lined as the mansion itself. Interestingly, the plan (note 3) states that square footage of the building is 6511.5 square feet. This square footage represents the main building only (bold-lined) and does not include the lightly-lined rectangular box, as can easily be demonstrated by using the tools in My Neighborhood and

the scale on the plan itself. Also, the site plan does not show any of the walkways depicted in the plans and aerials.

C. Petitioners Failed To Meet Their Burden To Conclusively Demonstrate That Those Aspects Of The Catering Facility In The DR 3.5 Zone Constitute A Legal Nonconforming Use

The burden of proving a legal nonconforming use rests squarely with the proponent. *See Calhoun v. County Bd. of Appeals of Baltimore County*, 262 Md. 265, 267 (1971) (burden of proof lies with proponent because "[t]he right ... to 'continue' a non-conforming use is not a perpetual easement to make use of one's property detrimental to his neighbors and forbidden to them"); *Lone v. Montgomery County*, 85 Md.App. 477, 496 (1991) (proponent must "establish[] the existence of a non-conforming use at the time of the passage of the prohibiting zoning ordinance" by showing that "the evidence conclusively establishes that before and at the time of the 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 a later legislative action became nonpermitted").

Here, Petitioners failed to meet their burden of demonstrating *conclusively* that the "tent" structure and other improvements in the DR 3.5 zone are legal nonconforming uses. First, Petitioners failed to demonstrate that the structure that exists today in the DR 3.5 zone was there in 2000 when the zoning changed. The only evidence offered by Petitioners on this point was the testimony of Mr. Clowney. He stated that the "tent" was present in 1998 when he acquired the property and assumedly was still there in 2000 (although he did not explicitly say that). However, this testimony is plainly refuted by the testimony of Mr. Weinstein and Mr. Sopher and by the plans offered into evidence by Petitioners. Mr. Weinstein, who walks the neighborhood nearly every day, testified that the "tent" was not there in 2013 when he

moved into the Grey Rock community. Mr. Sopher similarly testified that the "tent" was not there when he first moved in, which was in August 1999. More importantly, as discussed above, **the 1991 and 1994 plans introduced by Petitioners do not show any tent or structure on the eastern side of the mansion building, only the mansion building itself.**[3] **The 2003 and 2004 plans show only a walkway, not a tent or structure.**

Second, even if we completely ignore the plans and the testimony of Protestants' witnesses and believe instead the testimony of Mr. Clowney that a "tent" was present in 2000 when the zoning changed from BM to DR3.5, the evidence fully supports that this "tent" was not the structure that exists today. According to Mr. Clowney, the tent that allegedly existed in 2000 did not have any doors, had only string lighting, and no permanent heating or air conditioning. Mr. Clowney removed that tent in 2004 (after the change in zoning) and "replaced" it with an "upgraded," "new and improved" structure that has a center chandelier, café lighting, tables, and heating and air conditioning. Even if the structure that replaced the tent is the same size and located in the same place, as Mr. Clowney claimed, this was an impermissible extension of a non-conforming use. *See Wilson v. Mayor and Comm'rs of Town of Elkton*, 35 Md. App. 417, 425 (1977) ("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."); *see also County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 261 (1982) (addition of a sand and

[3] Again, this is contrary to the testimony of Mr. Clowney who said the "tent" was installed in 1990.

gravel wet-processing facility to a nonconforming surface mining sand and gravel operation was an impermissible change in use).[4]

Further, there was no evidence introduced by Petitioners demonstrating that the other aspects of the cater facility in the DR 3.5 zone – namely, the yard area, walkways, gazebo, and fountain – were in existence in the year 2000 when the zoning changed.

III. OTHER ARGUMENTS

A. Petitioners' "Modified Parking Plan"

In their Petition for Special Hearing, Petitioner seek approval of a "modified parking plan pursuant to BCZR 409.12.B." Section 409.12.B provides:

> B. If the requirements for parking space or loading space in Section 409 would create an undue hardship, the Zoning Commissioner may approve a modified plan upon petition and after a public hearing, the procedure for which is set forth in Section 409.8.B.1 above.

During the hearing, Petitioners did not submit any such "modified parking plan" or even describe what that plan, if one exists, entails. Moreover, Petitioners made no showing that any parking requirement in section 409 creates an undue hardship.

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[4] Prohibiting changes in a nonconforming use serves the "the earnest aim and ultimate purpose of zoning" which is to "reduce nonconformance to conformance as speedily as possible." *County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 261 (1982) (quoting *Grant v. Mayor of Baltimore*, 212 Md. 301, 307 (1957)); *see also Wilson*, 35 Md. App. at 425 ("The basic premise underlying zoning regulations is to restrict rather than expand non-conforming uses."). The reason for this rule is that "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 injury property values.... [T[his Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate nonconforming land uses" *County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 267 (1982). Thus, zoning regulations are "strictly construed in order to effectuate the purpose of eliminating nonconforming uses." *Id.* at 268.

B. Shared Parking Adjustment Under Section 409.6.B.3

Section 409.6.B.3 provides as follows:

> Shared parking adjustment. Two or more uses shall be permitted to share their off-street parking spaces in a common parking facility if the hours or days of peak parking for the uses are so different that a lower total will provide adequately for all uses served by the facility, without conflict or encroachment. To assure that no conflict or encroachment occur, shared parking spaces for such uses shall be provided according to the following table. [See Table]

Here, the special hearing relief sought by Petitioners extends to the .74 acre parcel to the southeast which is used as a parking lot for the catering facility. As noted during the hearing, the parking lot is also used in conjunction with the community swimming pool. Petitioners did not make the showing required by this provision or even address it.

C. Availability and Maintenance Of The Parking On The .74 Acre Parcel

Section 409.7 requires off-street parking to be located on the same lot as the use to which it is accessory. In the case of commercial uses, such parking may be located within 500 feet walking distance of the building entrance. 409.7.B.1. Although this distance requirement appears to be met with respect to the parking lot on the .744 acre parcel, section 409.7 requires that certain findings be made by the Director of PAI regarding the availability and maintenance of the parking lot. Section 409.7.C provides:

> Prior to the approval of any building permit involving an off-site parking facility, the Director of Permits, Approvals and Inspections shall require guarantees of the continued future availability and proper maintenance of the facility, including, but not limited to, a grant of an easement, a deed restriction, a restrictive covenant or a binding contractual agreement, including a lease. Any plans approved are conditioned upon and subject to periodic review by the Director to ensure that adequate parking arrangements continue to exist.

Here, Petitioners have not requested or obtained a finding by the Director of PAI that these guarantees have been provided.

IV. CONCLUSION

For each of these reasons, Protestants request that the Petition for Special Exception and Petition for Special Hearing be denied.

Respectfully submitted,

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Dated: February 16, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February 2022, the foregoing memorandum was sent via email and first class mail, postage prepaid, to:

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