

**CITY OF FREDERICK
ZONING BOARD OF APPEALS
MEETING MINUTES
October 22/December 17, 2013**

MEMBERS PRESENT:	MEMBERS ABSENT:	STAFF PRESENT:
Mr. Racheff Ms. Colby Mr. Patchan Mr. Butcher Mr. Marvin Kennedy Mr. Ying		Gabrielle Dunn, Division Manager of Current Planning Rachel Depo, Assistant City Attorney Jeff Love, City Planner

ANNOUNCEMENTS

For the benefit of the audience and especially the applicants, Mr. Racheff, Chairman, explained the Zoning Board of Appeals process and introduced staff by name.

APPROVAL OF MINUTES:

October 22/November 26, 2013 ZBA Minutes

MOTION: Mr. Butcher/ Ms. Colby moved to approve the October 22, 2013 hearing minutes as published. revised.

SECOND: Ms. Colby/ Mr. Patchan

VOTE: 4-0

APPROVAL OF SCHEDULE

2014-2015 Schedule

MOTION: Mr. Butcher moved to approve the 2014-2015 Schedule with the revision of moving that the December 23, 2014 meeting be moved up one a week to December 16, 2014 and that all associated deadlines be adjusted accordingly..

SECOND: Mr. Patchan

VOTE: 4-0

GENERAL PUBLIC COMMENT

There were no general comments.

CASES TO BE HEARD

OLD BUSINESS

CASE NO.: ZBA 13-329A, Appeal
LOCATION: 1910 Rosemont Avenue
APPLICANT: Leslie Powell

This case is an appeal by Janie M. Denn, Kathleen A. Murphy, and Charles F. Trunk, III (“Appellants”) from the decision of the Planning Commission to approve a Final Subdivision Plat submitted by the Board of County Commissions for Frederick County (BOCC) for the purpose of subdividing the North Montevue Campus, located at 1910 Rosemont Avenue, into two lots. The hearing for this case was conducted in accordance with the ZBA’s “Special Rules of Procedure for Appeals from Decisions of Planning Commission”.

The Board proceeded to discuss the merits of each finding of fact outlined in the draft Findings, Conclusion, Decision, and order of the Zoning Board of Appeals. Mr. Racheff started by going over the draft copy of the Findings, Conclusions, Decision and Order of the Zoning Board of Appeals of the city of Frederick, MD based on the following finding of facts:

FINDINGS OF FACT

1. In January 2013, the Board of County Commissions for Frederick County (“BOCC”) submitted an application (the “Application”) for a Final Subdivision Plat to subdivide its property located on Rosemont Avenue near the intersection with Rocky Springs Road, referred to as the North Montevue Campus (the “Property”) into two lots. Lot 1 contains the Citizens Care and Rehabilitation Center and Montevue Assisted Living Home. Lot 2 contains the balance of the Property.
2. The proposed Final Subdivision Plat (the “Plat”) submitted by the BOCC included a note (Note #2) stating, “This plat prepared without the benefit of a current review of title report.”
3. On April 3, 2013, Planning staff issued a Staff Report recommending approval of the Plat, with the following conditions:
 - (1) Provide blanket cross access easement agreement between Lot 1 and Lot 2;
 - (2) Provide title report and correct Note #2; and
 - (3) All proposed easements must be recorded prior to recordation of the plat.
4. The Land Management Code (LMC), includes a table of submittal requirements. (§ 1102, Table 1102-1). The table lists “Title Report” as submittal item #62 and shows, at the intersection of such item with “Final Plat”, the letter “M”. The “Rules of Interpretation for Table 1102-1” state:

Items coded with an "M" show the mandatory information that is required before an application will be considered to be complete for a specific application listed in the table. The requirements in this table will be checked before an application is accepted for processing. If information is not complete, the applicant will be notified by mail that the plan will not be processed and should be resubmitted after revisions are made.”

Section 1110(b)(8) includes additional requirements specific to the abstract of title for final subdivision plats.
5. On April 8, 2013, the Planning Commission conducted a public hearing to consider the Plat. The Planning Commission acknowledged that the title report, though required by the Land Management Code (LMC) to be submitted along with the Application, had not been submitted.
6. Members of the Planning Commission indicated that they believed BOCC’s intention to transfer the Property to be outside their purview in reviewing the Application.
7. At the conclusion of the April 8 public hearing, the Planning Commission voted 5-0 to approve the Application.

8. On May 7, 2013, the above-named Appellants filed a notice of appeal. The notice enumerated six grounds and issues for the appeal.

9. The appeal was conducted in accordance with the ZBA's Special Rules of Procedure, which provide for an "on the record" review of the Planning Commission's decision.

10. The record in this case was filed on or about July 23, 2013. The record is comprised of transcripts from the Planning Commission field trips, workshops, and public meetings as well as copies of exhibits and written testimony that was included in the review of the Application.

11. The ZBA received a written memorandum from the Appellant on or about August 22, 2013, from the BOCC on or about September 24, 2013, and from the Planning Commission on or about September 24, 2013.

12. On October 22, 2013, the Zoning Board of Appeals conducted a hearing in accordance with the Special Rules. Attorneys for Appellants, the BOCC, and the Planning Commission appeared and made oral argument, and answered questions posed by members of the ZBA.

13. After hearing oral argument, the ZBA continued the case until its regular November meeting, at which time the ZBA would reconvene to draft written findings as required by the Special Rules.

CONCLUSIONS OF LAW

LMC §315(d) governs the actions of the ZBA in this appeal. That section requires the ZBA in this case to determine "whether the action of the [Planning Commission] was arbitrary, capricious, discriminatory, or illegal, or whether they have properly applied the governing law to the facts. It further requires the ZBA to consider the following four factors:

(1) whether the [Planning Commission] recognized and applied the correct principles of law governing the case, including whether this Code was properly interpreted; and

(2) if the decision was not in error, whether the decision was supported by substantial competent evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Board shall resolve any conflicting evidence, and, where inconsistent inferences can be drawn from the same evidence, draw the inference that it believes is correct based upon evidence presented in the record; and

(3) how the [Planning Commission] applied the law to the facts; and

(4) whether the zoning restriction is constitutional or validly applied.

Whether the Planning Commission Recognized and Applied the Correct Principles of Law and Properly Applied the Law to the Facts of this Case

I. The Planning Commission Erred in Considering and Approving an Incomplete Application.

Under the LMC, all applications must include all information that is required by Article 11. (LMC §301(a)(2). Table 1102, as set forth above, prohibits the processing or acceptance of any application unless it includes all submittal requirements. In addition, § 1110(b)(8) requires an applicant to provide "an abstract of title to the land within the proposed subdivision setting forth all legal or equitable interests there in." It further requires that the final subdivision plat note the property owner's certification that "all easements, rights of way, or other matters of record which affect the property subject to the plat are depicted on the plat."

It is undisputed that the Application was not accompanied by a title report, an abstract of title, or a document to be recorded in the land records preventing future owners from restricting common access and usage. The LMC clearly indicates that the submission of these documents was mandatory. The Planning Commission had no authority to ignore the LMC by reviewing and approving the Application without first receiving and reviewing such documents. Moreover, review of these documents was necessary to the Planning Commission's evaluation of the application criteria of § 507(a), as further described below. Therefore, the Planning Commission incorrectly interpreted the LMC to allow for the acceptance and approval of an incomplete application, and its decision was thus in error.

II. The Planning Commission erred in failing to evaluate whether the Plat conformed to the Comprehensive Plan.

Under § 507(a)(1), the Planning Commission was required to find that the Plat conformed to the Comprehensive Plan. There is no evidence in the record that the Planning Commission made any such finding. The Planning Commission erred in failing to consider the Plat's conformity, or lack thereof, with the Comprehensive Plan.

III. The Planning Commission erred in interpreting the LMC by believing that they, the Planning Commission members, were restricted from asking the Applicant questions about the potential impacts of the Application.

IV. The issue raised by Appellants on Appeal that the BOCC has breached State law and the LMC by negotiating to sell unsubdivided land was not properly before the ZBA.

This issue was not before the Planning Commission during its review of the Application; the Planning Commission did not consider or decide this issue. The issue is not within the jurisdiction of the ZBA, and therefore we decline to discuss it any further.

V. The ZBA's Special Rules did not violate State law or the Appellants' Due Process rights.

Appellants contend that the Special Rules violate State law and their due process rights because Maryland law requires a de novo review of the Planning Commission's decision. It is not the Special Rules that creates this requirement, but LMC § 315(d). The cases cited by Appellants to support their position are distinguishable. The ZBA properly conducted an "on the record" review of the Planning Commission's decision, as the Circuit Court for Frederick County has previously decided. In "Bridgeford v. Zoning Board of Appeals", the Circuit Court analyzed LMC § 315(d) and held that "the ZBA is not authorized to substitute its own judgment" for that of the Zoning Administrator and thus "exceeded its appellate statutory standard of review" when it "considered more evidence than what was in front of the Zoning Administrator." And in the recent case of Lisa Boyle, et. al, the Circuit Court affirmed the ZBA's decision to affirm a decision of the Planning Commission, following an "on the record" review conducted in accordance with the Special Rules, finding that LMC § 315(d) limits the ZBA to an "on the record" review and that the Special Rules "more than satisfy the due process requirement".

As such, we reaffirm the Special Rules do not violate State law or the Appellant's substantive due process rights.

VI. The Appellants have standing.

Appellants Janie M. Denn and Kathleen A. Murphy own properties proximate to the Property, and therefore are aggrieved and have standing to appeal the decision of the Planning Commission to the ZBA. Appellant Charles F. Trunk, III, was previously the Chairman of the CCRC Board of Trustees, and has an established trust to provide for CCRC, and is therefore specially affected by this matter in a way that is different from that suffered by the public generally.

DECISION AND ORDER

On the basis of the above findings of fact and conclusions of law and the record herein for this matter, the Zoning Board of Appeals determines and orders as follows:

THAT THE PLANNING COMMISSION'S APPROVAL OF THE APPLICATION IS HEREBY VACATED AND THAT THIS MATTER IS HEREBY REMANDED TO THE PLANNING COMMISSION FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS DECISION AND ORDER.

PUBLIC COMMENTS:

There were no public comments.

MOTION: In the case of ZBA13-329A, that based on the findings of fact agreed upon and dictated in this hearing, to be enumerated in the Findings and Decisions that the April 8, 2013 decision of the Planning Commission be vacated. Mr. Racheff moved to have the application vacated and that this matter is remanded to the Planning Commission for further proceedings to be conducted appropriately in accordance with the Land Management Code.

SECONDED: Mr. Patchan

VOTE: 4-0

There was no old business.

NEW BUSINESS

CASE NO.: ZBA 13-760CU878CU, Conditional Use

LOCATION: Lallo's Restaurant, 10 Clarke Place 5 Willowdale Drive, Unit A-6

APPLICANT: Monique Pasquale Juan Rogjas

Mr. Love entered the entire staff report into the record.

PUBLIC COMMENTS:

Representatives from Willow Tree Plaza sent Mr. Love an email indicating they are in support of this case.

Representatives from Way of Broadway Dinner Theatre also sent an email to Mr. Love indicating they are in support of this case.

Mr. Vangrootenbruel resides at 171 Greenway Drive and is in support of this case.

Two anonymous emails were put into record and they were concerned about the parking along the street.

Ms. Kathryn McKenzie is located at 116 Clarke Place. She was concerned about having two bed and breakfast on their street and that parking would be an issue.

Mr. Phil LeBlanc is located at 4 Clarke Place and is in support of this application.

Mr. Wayne Larkin is located at 112 Clarke Place and is concerned about the parking, and wondering if this business is already servicing operating out of her home.

MOTION: Mr. Patchan Ms. Colby moved for approval to deny this application based on the following findings of fact:

1. That the proposed use is not in harmony with the purpose and intent of the LMC and the Comprehensive Plan.
2. That the proposed use has the potential to generate a greater adverse impact on the adjacent properties than other uses permitted by right in the district.
3. That the project does not comply with all of the criteria established under §856 of the LMC for the establishment of a restaurant with entertainment, specifically subsection (e) which requires restaurants with entertainment to be at least 500' from the nearest residentially zoned lot.
 - The subject property is located in the General Commercial (GC) zoning district.
 - The subject property is currently operating as a general restaurant.
 - The Applicant has requested approval of a conditional use to allow entertainment to be provided in conjunction with the existing use.
 - The Zoning Board of Appeals may authorize a *restaurant with entertainment* as a conditional use per Section 404, Table 404-1 of the LMC, entitled the *Use Matrix*, pending a finding of compliance with the applicable criteria established in Sections 308, 312, and 856 of the LMC.
 - The Applicant is requesting approval for the establishment of entertainment in the form of acoustic or live (amplified) music and DJs.
 - The restaurant sells food to the consumers in a ready-to-consume state.
 - The restaurant provides 80.7% of the fire rated capacity with seating at tables.
 - The tenant space where the restaurant with entertainment is located less than 500 feet (approximately 375 feet) from a lot in a residential district to the north of the subject property.

STAFF RECOMMENDATION

Based upon the findings of fact, Staff does not support approval of the conditional use request for a restaurant with entertainment finding that the tenant space is located less than 500 feet from a lot in a residential district and therefore fails to comply with the requirement under §856(e).

1. The policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC) support the use of the property as a bed and breakfast.
2. The characteristics of the bed and breakfast/tourist home and its operation on the property in question may create additional impacts such as increase pedestrian or vehicular traffic and parking needs; however, compliance with the criteria established under Section 809 of the LMC will ensure that the proposed use will not create a greater adverse impact than any use permitted by right in the R4 district.
3. The proposed use of the property complies with the provisions of Article 8, Section 809 entitled *Bed and Breakfast/Tourist Homes* based on the following:
 - a. The property is adequate for the proposed use and the use of the property for a bed and breakfast will not constitute a nuisance because of increased vehicular traffic, noise, odor or any other activity associated with the use.
 - b. The property lies within the HPO (Historic Preservation Overlay) and therefore, is not limited by the number of bed and breakfast/tourist homes in the vicinity or the proximity to another bed and breakfast/tourist home.
 - c. The property owner resides at the subject property.
 - d. There will be no exterior evidence of the bed and breakfast/tourist home other than a two (2) square foot sign.
 - e. The Applicant has adequately demonstrated that a modification to the parking requirements is warranted and that available on street parking in the area is adequate to mitigate the reduction in off street parking.
 - f. The Applicant has provided guarantees that the property will not be used, leased, or rented for business or wedding reception activities.
 - g. The Applicant has indicated that breakfast will be the only meal served to guests and that it will not be served to any other paying nonresident of the premises.
 - h. The Applicant has provided guarantees that no paying guest will remain in the bed and breakfast for more than fourteen (14) days within a thirty (30) day period.
 - i. Only two (2) guests over the age of 18 will be permitted per guest room associated with the bed and breakfast.
 - j. The Applicant has indicated that they will maintain a register of all paying guests listing the guests' names, dates of arrival and departure, room number and number of occupants per room. Said register will be made available to appropriate city officials upon request.

Based upon all these findings, the City of Frederick Zoning Board of Appeals hereby, approves a conditional use for a Bed and Breakfast, according to Section 308 and 809 of the Land Management Code, with the following condition: Mr. Patchen condition the approval on one condition:

1. In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use of a bed and breakfast/tourist home within 2 years of the approval or the approval shall become void.

SECONDED: Ms. ColbyMr. Butcher

VOTE: 4-1. Mr. Patchan was opposed.0

The meeting adjourned at 9:278:16 p.m.

Respectfully submitted,

Lea M. Ortiz