BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6123

APPEAL OF L. EDWARD O'HARA, JR. AND
THE CLOVERLY MASTER PLAN CITIZENS' ADVISORY COMMITTEE

RESOLUTION OF THE BOARD TO GRANT STANDING TO THE APPELLANTS AND TO GRANT THE MOTION TO DISMISS OF THE PARTIES

(Hearings held on May 31, 2006, September 20, 2006 and January 10, 2007)
(Effective Date of Opinion: August 27, 2007)

Case No. A-6123 is an administrative appeal filed by Edward O'Hara, Jr. and the Cloverly Citizens' Master Plan Advisory Committee ("Appellants"), charging administrative error on the part of the County's Department of Permitting Services ("DPS") in its December 19, 2005 issuance of Certificate of Nonconforming Use Number 241824 ("NCU Certificate") to Arbor Landscapers, Inc. ("Arbor"). Arbor is located at 2214 Spencerville Road, Spencerville, Maryland 20868 (the "Property").

Pursuant to Section 59-A4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), and Section 2-112 of the Montgomery County Code, the Board scheduled a public hearing on this appeal. After receiving a preliminary Motion to Dismiss for lack of standing from counsel for Arbor (which had been permitted to intervene in this matter and may also be referred to herein as the "Intervenor"), as well as a Motion to Dismiss from counsel for DPS (which was later withdrawn), the Board determined to bifurcate the hearing and to hold a hearing on the standing issue on May 31, 2006, and a hearing on the merits, if appropriate, on September 20, 2006 which was continued to January 10, 2007 at the request of counsel for both the Appellants and the Intervenor. Donald H. Spence, Jr., Esquire, Greenburg, Spence and Taylor, represented Appellants in the proceedings. Steven P. Elmendorf, Esquire, and Kenneth P. Wire, Esquire, of Linowes and Blocher represented Intervenor Arbor in the proceedings. Assistant County Attorney Malcolm Spicer, Jr., represented DPS in the proceedings, but did not participate in the May 31, 2006 argument regarding Intervenor's Motion to Dismiss.

Decision of the Board: Intervenor's Motion to Dismiss for lack of standing **denied**; the parties' joint Motion to Dismiss **granted**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. The subject Property is known as 2214 Spencerville Road, Spencerville, Maryland 20868 (Tax Map KS32, Parcel P103), and is located in the RE-1/RC zone.

2. Intervenor was issued a Special Exception (Case No. S-820) to operate a horticultural nursery and commercial greenhouse pursuant to a Resolution of the Montgomery Board of Appeal, dated July 21, 1982 and modified by a Resolution, dated January 3, 1986.

3. Zoning Text Amendment No. 85014, Ordinance No. 10-69 became effective on March 25, 1986 and effectively eliminated the horticultural nursery and commercial greenhouse special exception use and replaced it with four new special exceptions uses that are retail horticultural nursery (Section 59-G-2.30); wholesale horticultural nursery (Section 59-G-2.30.0); landscape contractor (Section 59-G-2.30.00) and manufacturer of mulch and composting (Section 59-G-2.30.000). The horticultural nursery and commercial greenhouse special exceptions granted prior to March 25, 1986, the effective date of the Zoning Text Amendment, should therefore no longer be considered special exception uses, but are now non-conforming uses.

4. On December 19, 2005, Charles Stevens, Jr. applied for and received the NCU Certificate as owner of Arbor. Intervenor's current operation includes operation of a landscape contracting business and commercial nursery which includes receipt, storage, care, and growth of plants, shrubs and trees, and resale of plants, shrubs, and trees to other landscape contractors. The property is open from 7:00 a.m. to 5:00 p.m. on weekdays, and from 8:00 a.m. to 12:00 p.m. on Saturdays. Between mid-March and November, Intervenor operates with approximately 60 employees, with 20 employees remaining on site to operate the commercial nursery, and approximately 40 employees leaving the site to provide landscape contracting services elsewhere. Between December and mid-March, Intervenor operates with approximately 40 employees, with approximately 20 employees remaining on site to operate the commercial nursery, and 20 employees leaving the site to provide landscape contracting services elsewhere. Improvements to the site consist of: construction of a 2,200 square-foot office building and the 8,586 square-foot, open-sided storage building reflected on the 1986 Special Exception Plan; two 1,350 square-foot pole buildings; a 300 square-foot shed (mounted on skids); and an outdoor storage area, measuring approximately 44 feet by 50 feet, enclosed with a chain link fence which is used to store landscaping equipment.

5. A Notice of Violation dated May 14, 2004 ("NOV") was issued by DPS Investigator Stan Garber for the special exception in which the following violations were cited: 1) additional buildings on the subject Property without Board of Appeals approval; building permits, electrical permits, or utility permits 2) cars parked throughout property and parking lot reconfigured; 3) additional

signs on the property in violation of condition no. 5; 4) missing pine tress along lot 5; 5) storage placed outside and within 50' required setback; 6) fenced storage area without approval; 7) dumpsters on premises as well as several portable johns with no approval; and 8) additional equipment (trucks, trailers, etc.).

6. In response to the NOV, the Intervenor filed an application for a modification of the special exception in April 2005, describing the use as an existing wholesale nursery and landscape contracting business. DPS had recommended modification of the special exception as a means of remedying the illegal expansion and noncompliant use of the site. In reviewing the modification request, technical staff of the Montgomery- National Capital Park and Planning Commission ("M-NCPPC") noted its concerns for the breadth of changes to the site which staff conveyed to the Intervenor. The Intervenor then withdrew the modification request and subsequently filed an application for a new special exception for a landscape contractor and wholesale nursery operation, pursuant to the special exception designations established in 1986. During its review of the new special exception application, technical staff determined that the outstanding violations on the Property were of such a magnitude that technical staff was unable to analyze which aspects of the then-existing special exception had been approved and to move forward with analyzing the requests for a new special exception or modification of the application. After review of the application for a new special exception, technical staff of M-NCPPC wrote a memorandum dated September 8, 2005 constituting a complaint to the Board of Appeals. Section 59-G-1.3(b) of the Montgomery County Zoning Ordinance provides that any county agency may initiate a complaint alleging failure to comply with the terms or conditions of a special exception grant and may file such complaint with DPS or the Board. In its memorandum dated September 8, 2005, technical staff summarizes the issues preventing an adequate analysis of the new special exception application, stating that Intervenor continued to violate the terms of the special exception and that recommending that remedial action should not occur through the special exception application process. The Board viewed technical staff's memorandum as a complaint pursuant to Section 59-G-1.3(b) and considered the memo at its Worksession on September 14, 2005. The Board issued a resolution effective September 27, 2005 to request an inspection by DPS. Mr. Garber conducted an inspection on November 21, 2005 and found the violations that he described in the NOV of May 14, 2004 remained unabated.

7. On December 22, 2005 Mark M. Viani, Esquire, submitted a letter on behalf of Arbor informing the Board that DPS had issued a Non-Conforming Use Certificate to Arbor on December 19, 2005, and requested that the Board cease or cancel any further actions or proceedings related to the special exception. The Board considered Mr. Viani's letter at its January 25, 2006 Worksession and found that the special exception has become a non-conforming use by operation of law. The Board issued a resolution to dismiss the show cause hearing against Arbor.

8. On January 17, 2006, Appellants appealed charging error in administrative action or determination alleging that DPS erred in issuing the NCU Certificate without establishing what aspects of the use were lawful, as set forth in the Special

Exception grant, and therefore would be permitted to continue as part of the non-conforming use.

9. On March 15, 2006 the Board convened a pre-hearing conference with all of the parties and the Board determined to bifurcate the hearing and to hold a hearing on the issue as to whether Appellants have standing on May 31, 2006, and a hearing on the merits, if appropriate, on September 20, 2006.

10. On May 31, 2006 a hearing was held with all of the parties on the issue of whether Appellants had standing to bring the appeal.

11. On September 20, 2006 the Board convened a hearing on the merits of the appeal. The parties requested and received a 60 day continuance until January 10, 2007. On January 10, 2007 the Board conducted a hearing on the merits.

SUMMARY OF ARGUMENTS

I. Does the Cloverly Master Plan Citizens' Advisory Committee have standing to bring the appeal?

The Cloverly Master Plan Citizens' Advisory Committee ("CAC") was appointed in 1995 by the Montgomery County Planning Board to comment on and participate in proceedings related to the implementation to the Cloverly Master Plan. The CAC comprises six active members. The members of the Committee live and work in the Cloverly planning area. The Planning Board also adopted and directed the CAC to operate in accordance with the Concordia Process, a consensus based planning process. The Planning Board further gave the CAC the option to continue its existence after the adoption of the Cloverly Master Plan by the County Council.[1] The CAC continues to operate and its activities include proceedings before this Board, the Planning Board, and the County Council on issues affecting land use under the Cloverly Master Plan.[2]

The Montgomery County Zoning Ordinance, Section 59-A-4.46(a)(6) provides that upon the filing of a petition with the Board, notice must be sent to the president or other designated representatives of any local citizens' association or associations. The Cloverly CAC is listed in the Board's records as one of those associations [Ex.16(a)].

Appellants argue that the CAC has standing pursuant to Montgomery County Code, Article 59, Section 59-A-4.3(a) which provides for the filing of administrative appeals to the Board. That section states: "Appeals to the Board may be made by any person, Board, association, corporation or official allegedly aggrieved by the grant or refusal of a building or use and occupancy permit or by any other administrative decision based or claimed to be based, in whole or in part, upon this chapter, including the zoning map."

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[1] *See* Affidavit of Bill Barron, Team Leader, Community Based Planning, Montgomery County Planning Department. [Ex. 12(a).]

[2] *See* Affidavit of L. Edward O'Hara, Jr., Chair Cloverly Master Plan Citizens' Advisory Committee. [Ex. 12(d).]

Therefore, Appellants argue that since the Montgomery County Code clearly gives any "person, Board, [or] association" status as a potential party, the CAC, a body established by the Planning Board for the express purpose of addressing land use issues regarding the Master Plan area within which the Property is located, has standing to bring its appeal under Section 59-A-4.3(a).

Appellants further argue that they have been aggrieved by Intervenor's actions through its operation of the special exception in a manner that was not authorized in the conditions approved in 1986. Intervenor was authorized to have 20-30 employees during the property owner's peak season and Appellants allege that they have operated with up to 100. Appellants assert that the use has had a significant adverse effect on surrounding property owners, creating substantial amounts of traffic not contemplated by the original approval, and the use is generally inconsistent with the Cloverly Master Plan.

Intervenor argues that the CAC does not have standing because it has not established that it has been aggrieved and has not alleged or proved that a specific interest or property right has been specifically affected in a way different from that suffered by the general public as required by *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967).

Intervenor argues that under *Bryniarsk*i, "[a] person aggrieved by the decision of … [an administrative agency] is one whose personal or property rights are adversely affected by the decision of the … [agency.] The decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from that suffered by the public generally." *Bryniarski*, 247 Md. at 144, 230 A.2d at 294.

Additionally, Intervenor goes on to argue that under *Bryniarski* "[a person] will be considered a person aggrieved if he meets the burden of alleging and proving by competent evidence … the fact that his personal or property rights are specially and adversely affected …" *Bryniarski*, 247 Md. at 145, 230 A.2d at 295.

Therefore, Intervenor argues that in this appeal the CAC has not alleged, and cannot prove, that it has personal interests or property rights that were adversely affected by DPS' issuance of the NCU Certificate. Moreover, Intervenor argues that the CAC has not proven a specific interest or property right that is specifically affected in a way different from that suffered by the public generally.

Appellants counter that they satisfy the criteria for standing pursuant to *Bryniarski*. The Court of Appeals held in *Bryniarski* that the owners of property immediately adjacent to and in close proximity to the property at issue had standing as "aggrieved persons" because they were entitled to notice of actions concerning the subject property under applicable zoning ordinance provisions. The Court held in that merely by being identified in the statute as persons entitled to notice in connection with the action at the subject property, the appellants enjoyed "statutory recognition" that supported a presumption that they would be considered to be within the class of persons potentially "aggrieved" by actions concerning the subject property and therefore were proper parties before the Court. *Bryniarski,* 247 Md. at 143, 230 A.2d at 293. Accordingly, Appellants argue that

their status as parties entitled to notice pursuant to Section 59-A-4.46(a)(6) satisfies the "statutory recognition" test set forth in *Bryniarski* to establish aggrievement in connection with DPS' issuance of the NCU Certificate.

Further, Appellants argue that, notwithstanding the criteria set forth in *Bryniarski*, which addressed judicial standing, Appellants have standing before the Board, since the threshold for establishing standing before an administrative body is lower than that applicable to standing before a court. The Court of Appeals has observed that "[t]he requirements for administrative standing under Maryland law are not very strict," *Sugarloaf v. Dept. of Environment*, 344 Md. 271, 686, A.2d 506, 613 (1996), and "that the threshold for establishing oneself as a party before an administrative agency is indeed low." As the Court of Appeals explained, "the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings." *Sugarloaf,* 344 Md. at 286, 686 A.2d at 521.

II. If the CAC is granted standing, then the parties request that the appeal of DPS' issuance of the NCU Certificate be dismissed.

In bringing the appeal, the Appellants asserted that DPS acted improperly when it issued the NCU Certificate because the County's May 14, 2004 NOV stated that the pole buildings had been constructed without building permits, electrical permits or use and occupancy permits. Mr. Spence submitted a letter in this proceeding on January 9, 2007, [Ex. 24], requesting that the appeal be dismissed and confirming the acquiescence of all the parties in the request. The letter indicates that Arbor had obtained building permits for the structures on the subject property. Accordingly, the parties agreed that the primary issues underlying this appeal were effectively mooted. The parties requested that the Board issue a Resolution reflecting its decision on the standing of the CAC to bring this appeal. The parties agreed that upon the issuance of the Resolution, the appeal should be dismissed.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including sections 2B-4, 4-13, 8-23, 15-18, 17-28, 18-7, 22- 21, 23A-11, 24A-7, 25-23, 29-77, 39-4, 41-16, 44-25, 46-6-47-7, 48-28-49-16, 49A-39A, 51-13, 51A-10, 54-27, and 58-6, and chapters 27A and 59.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law,

ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of the hearing. In the instant matter, because granting of the Motions to Dismiss would eliminate the need for further proceedings (and the attendant preparation for those proceedings), the Board elected to bifurcate this hearing such that the Board would hear oral argument on and would vote on the Motion to Dismiss with respect to Appellants' standing one day and then, if the Motions were not granted, would take up the balance of the case during a second day of hearings. The County also submitted a Motion to Dismiss for lack of standing but withdrew the motion at the Board's May 31, 2007 hearing.

4. The Board decided the following:

I. Appellants' Standing

Intervenor has asserted that *Bryniarski*, 247 Md. 137, 230 A.2d 289, supports the proposition that the CAC does not have standing to appear before the Board of Appeals. The Intervenor argues that the Cloverly CAC has no personal interest or property right that was specially affected by DPS' issuance of the NCU Certificate "in a way different from that suffered by the public generally" as is the standard required by *Bryniarski.* See *Bryniarski*, 247 Md. at 144, 230 A.2d at 294.

Appellants counter that they satisfy the criteria for standing pursuant to *Bryniarski* because the CAC is recognized in the Zoning Ordinance as a party entitled to notice in connection with the filing of special exception petitions with respect to the Property. Appellants argue that such "statutory recognition" creates a presumption that they would be considered to be within the class of persons potentially "aggrieved" by actions concerning the subject Property and therefore are entitled to standing before the Board. *Bryniarski,* 247 Md. at 143, 230 A.2d at 293.

Exhibit 16(a) lists the members of the Cloverly Master Plan Citizens Advisory Committee which includes Edward O'Hara as Chair of the Eastern Montgomery County Chamber of Commerce, Inc. In his affidavit which is Exhibit 12(d), Mr. O'Hara indicates that he was appointed chair of the Cloverly Master Plan Citizens Advisory Committee by the Montgomery County Planning Board. Further, the record contains a mailing list which includes Edward O'Hara as a person to whom notice was sent. The Board finds that because Appellant meets the statutory requirement as the designated representative of the CAC to receive notice of actions concerning the Property for which notice would be required, then it is presumed under the Zoning Ordinance that Appellants would be aggrieved parties with respect to any actions concerning the Property.

Additionally, the CAC, as a body established by the Planning Board to represent neighborhood interests, including those of individual residents and citizens' associations, in connection with land use questions in the Cloverly area, clearly

satisfies this criterion. Therefore, the CAC also satisfies the criterion set forth in *Bryniarski* by which status as an aggrieved party sufficient to support standing before a court may be ascertained through such "statutory recognition." *Bryniarski,* 247 Md. at 143, 230 A.2d at 293.

Appellants also argue that different standards apply in order to establish standing before an administrative body as opposed to a court, as set forth in *Sugarloaf,* 344 Md. at 286, 686 A.2d at 521, and, as stated in *Maryland National Park and Planning Commission v. Smith*, 333 Md. 3, 10, 633 A2.d 855, 859 (1983), "the threshold for establishing oneself as a party before an administrative agency is indeed low." The Board finds that the criteria for establishing standing before an administrative body apply in this appeal, and accordingly agrees with Appellants that they satisfy the criteria set forth in *Sugarloaf*.

On a motion by Caryn L. Hines, seconded by Donna L. Barron, with Wendell M. Holloway, Catherine G. Titus and Allison Ishihara Fultz, Chair, in agreement, the Board denied the Intervenor's Motion to Dismiss for lack of standing, the Board granted standing to the CAC.

II. The issue of whether DPS properly issued the NCU Certificate

Appellants argue that DPS was incorrect in issuing the NCU Certificate to Intervenor. By way of background, the Board notes that an existing special exception use is converted into a lawful nonconforming use by operation of law where the Zoning Ordinance eliminates or substantively changes the criteria applicable to the previously lawful special exception use. Section 59-A-2.1 of the Zoning Ordinance defines a nonconforming use as a "use that was lawful when established and continues to be lawful, even though it no longer conforms to the requirements of the zone in which it was located because of the adoption or amendment of the zoning ordinance or the zoning map." Once a former special exception use has become a lawful, nonconforming use, it no longer falls under the jurisdiction of the Board, but rather is governed by the provisions of Division 59-G-4 of the Zoning Ordinance, which is administered by DPS. A special exception use that becomes a nonconforming use remains subject to any conditions in the special exception grant that were applicable to the special exception use at the time the use became nonconforming. A nonconforming use can be intensified as long as the intensification does not contravene any of the still-applicable special exception conditions, but the use cannot be extended.[3]

In this case, the facts indicate that the Board approved the special exception to Intervenor to operate a horticultural nursery and commercial greenhouse pursuant to a Resolution of the Montgomery Board of Appeals, dated July 21, 1982 and modified by a Resolution, dated January 3, 1986. While the Board's Opinion clearly describes a landscape contracting operation, the special exception was approved under the category of "horticultural nurseries and commercial greenhouses" contained in Section 111-37(p-1) of the then-existing Zoning Ordinance.

[3] Memorandum from the County Attorney regarding Status of Special Exceptions Deleted from the Zoning Ordinance, to the Board of Appeals (September 1, 2005)("County Attorney Memo")

Zoning Text Amendment No. 85014, Ordinance No. 10-69 became effective on March 25, 1986 and effectively eliminated the horticultural nursery and commercial greenhouse special exception use and replaced it with four new special exception uses: retail horticultural nursery (Section 59-G-2.30); wholesale horticultural nursery (Section 59-G-2.30.0; landscape contractor (Section 59-G-2.30.00) and manufacturer of mulch and composting ((Section 59-G-2.30.000).

When the statutory provisions permitting a particular use, including those governing a special exception, are deleted or substantially modified, the prior grant of approval is nullified except where rights have vested, in which case the specially permitted use becomes a lawful non-conforming use. (Rathkopf, *The Law of Zoning and Planning*, Section 61:50.) The prior provisions of the Zoning Ordinance are no longer of any force or effect unless the ordinance contains a "grandfathering" provision expressly making them applicable in specified circumstances.

In this case, the zoning provisions governing "horticultural nurseries" in effect when the special exception for the subject Property was approved in 1982 were "completely restructured" and substantially revised in 1986. In effect, the "horticultural nursery" special exception of Section 111-37(p-1) was deleted and now no longer exists. Further, no "grandfathering" clause exists in the Zoning Ordinance expressly continuing the prior special exception standards for this use.[4]

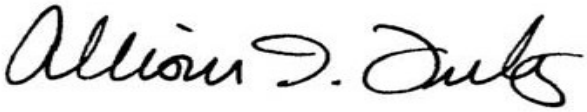
Therefore, the horticultural nursery and commercial greenhouse special exceptions granted prior to March 25, 1986, the effective date of the Zoning Text Amendment, should no longer be considered special exception uses, but are non-conforming uses, subject to applicable nonconforming use regulations outlined in Section 59-G-4 of the Zoning Ordinance. Consequently, assuming the use has been continuous and uninterrupted since the adoption of the Zoning Text Amendment, and has operated in conformance with the terms and conditions of the special exception grant establishing the use (subject to allowable changes as set forth Section 59-G-4), the landscape contracting operation at the Property would be regarded as a lawful nonconforming use. As such, any changes to the use or alterations to structures containing the use are governed exclusively by the provisions of Division 59-G-4. These provisions are administered by DPS, and not the Board. However, since the Board has jurisdiction to hear and decide appeals to actions of DPS, this appeal was filed to challenge the basis on which DPS found Arbor to be a *lawful* non-conforming use.

It is reflected in the record that during the September 20, 2006 hearing, Appellant and Intervenor agreed that Intervenor would investigate what building permits would be needed to abate the violations identified in the NOV, and that the parties would jointly request dismissal of the appeal if Intervenor successfully obtained the necessary permits. The Board is treating the parties' joint request to dismiss in the parties' letter dated January 9, 2007 as a joint Motion to Dismiss. It was indicated in the letter that Intervenor has obtained building permits from DPS for the structures on the subject property.

[4] See County Attorney's Memo

On a motion by Caryn L. Hines, seconded by Catherine G. Titus, with Donna L. Barron, Wendell M. Holloway and Allison Ishihara Fultz, Chair, in agreement, the Board granted the parties' joint Motion to Dismiss the appeal, and adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



Allison I. Fultz, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 27th day of August, 2007

_____
Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Board (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceedings before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).