

IN THE MATTER OF	:	BEFORE THE
PRADIP GHOSH	:	HOWARD COUNTY
T/A SHANGRI-LA	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 11-002N

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DECISION AND ORDER

On March 31, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Pradip Ghosh t/a Shangri-La, for confirmation of a nonconforming use and enlargement of an Assisted Living Facility in an R-20 (Residential-Single) Zoning District, filed pursuant to Sections 129.D & E of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to complying with the notice, posting, and advertising requirements of the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented the Petitioner. Pradip Ghosh testified on behalf of the Petitioner. Pradip Ghosh testified in support of the petition. No one appeared in opposition to the petition.

The Petitioner introduced the exhibits as follows into evidence.

- A. Board of Appeals (BOA) Case No. 94-16E decision and order granting two-year extension,

March 30, 1999

- B. March 6, 2001 letter to BOA from Pradip Ghosh, requesting BOA to confirm compliance with the requirement of "obtaining a building permit" through the grading permit and construction permit for sewer and storm drain, and March 6, 2001 letter from Avis Corbin, Department of Inspections, Licenses & Permits (DILP) concerning incomplete submission of building permit applications for group care facility and recreation building
- C. March 13, 2001 response letter from BOA to Pradip Ghosh informing him that the issue of whether a building permit has been obtained is a Department of Planning and Zoning determination
- D. County Council Bill 42 (ZRA 31 2001), to amend Zoning Regulations to permit BOA to grant a third extension to a conditional use when delay is caused by a change of federal, state, or local law or policy
- E. January 19, 2002 letter to BOA, requesting extension pursuant to County Council Bill 42 (ZRA 31 2001), discussing new county legislations relating to site plan development and new state law (2001) pertaining to assisted living programs
- F. March 26, 2003 letter to George Beisser, DPZ Chief of Zoning Administration, discussing whether or not the project has met the definition of "substantial construction" and DILP's failure to issue building permits, photographs of sewer water line, storm drain, fire hydrant storm water management pond, foundation work, site development plan, DILP building permit form dated 2/21/03

FINDINGS OF FACT

Based upon the TSR, the petition, and my site visit, I find as follows:

1. Property Identification. The irregularly shaped, pipestem, 1.89-acre subject property is situated on the northeast side of MD 103 (Montgomery Road) about 1,500 feet southeast of Long Gate Parkway and is known as 4475 Montgomery Road (the "Property"). The Property is located in the 2nd Election District and is identified as Tax Map 31, Grid 1, Parcel 579, Lot 4.
2. Property Description. The Lot 4 (the Site) pipestem does not extend along the existing driveway shared with the adjoining Lot 3, but to the MD 103 frontage along the front portion of the southeast lot line. A portion of the pipestem appears to be located in a wetland

according to the site development plan in Petitioner's Exhibit F. Access is instead provided initially from the centrally located driveway shared with Lot 3, off MD 103. About 225 feet from MD 103, the curves to the northeast and becomes a small parking lot with a central drive aisle and perpendicular parking spaces, most of which are on the north side of the aisle.

On the north side of the parking lot is the assisted living facility with a long, narrow patio on its south side. According to the Technical Staff Report (TSR), this patio does not appear to comply with the 20-foot use setback. The area to the recreation building's southwest and west is wetlands and wetlands buffer. There is little landscaping on the Site.

3. Vicinal Properties. The northeast side of MD 103 is also zoned R-20. The adjoining parcel to the northwest is the site of the Ellicott Mills Middle School. The adjoining parcel to the southeast, Parcel 592, is a single-family detached dwelling subdivision (Turkey Farm Place, Lots 1-6). Lot 1 is encumbered with wetlands and associated buffers where it adjoins the Site and is improved by a single-family detached dwelling situated toward the rear lot line. Parcel 481, which adjoins the Property's southerly (side) lot line and fronts on MD 103 is the site of a Howard County water pumping station. To the Property's southwest, across MD 103, are several residential developments zoned R-SC (Residential: Single Cluster).

4. Roads. MD 103 has two northbound travel lanes, one southbound travel, a center turn lane and about 44 feet of paving with a variable width 80-foot right-of-way. The posted speed limit is 45 MPH. Sight distance from the driveway entrance is good, with a sight distance of more than 500 feet. State Highway Administration data reports the traffic volume on MD 103 east of US 29 as 28,740 average annual daily trips as of 2007.

5. Water and Sewer Service. The Property is served by public water and sewer facilities.

6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Residential." The General Plan Transportation Map depicts MD 103 as a Minor Arterial.

7. Agency Comments. The DPZ Division of Land Development comments state that a total of six additional parking spaces are required for the requested addition of 15 beds and that the additional parking spaces must address county landscaping requirements.

8. Zoning History (Partial, Concerning old those associated with the facility)

A. BA 07-038C, conditional use for a nonprofit community hall and camp denied on March 13, 2008

B. BA 96-27E Modification granted to an existing special exception to reduce the side of the special exception to 63,560 square feet granted November 14, 1996

C. BA 94-16E special exception granted for a group care facility for the elderly granted November 30, 1990 (two-year extension granted in 1999)

D. BA 89-051E, special exception to operate a group care facility for the elderly on that portion of Parcel 579 not covered by BA 89-011E.

9. The Proposal. The Petitioner requests confirmation of a nonconforming use for the Facility, which is stated as comprising two buildings, a two-story main 33,584-square foot main building, a 5,489-square-foot recreational building, and 25 parking spaces (the Facility). The petition states the use became nonconforming on July 12, 2001, the effective date of ZRA-30, which amended or eliminated the old special exception categories in the zoning regulations in the adoption of a new Section 131 for conditional uses. The Petitioner also requests approval for an enlargement/extension of the alleged nonconforming use, which adds fifteen beds, for a

total of 60 beds, with no new construction. Five new parking spaces are proposed "if ultimately deemed necessary". The TSR notes the nonconforming use plan depicts four spaces.

10. The items submitted with the petition included decision and orders for BOA Case Nos. 89-51E, BA 94-16E, BA 97-27E; two two-year year licenses from the Maryland Office of Health Care Quality, one for 2008-2010 and the second for 2010-2012, and; a May 30, 2006 DILP certificate of use and occupancy for 4475 Montgomery Road, Shangri-La Homes.

11. Pradip Ghosh testified that the 15 additional units proposed upstairs would not be taken from any common space or rooms, or any regulated facility component.

CONCLUSIONS OF LAW

I. Confirmation of Nonconforming Uses (Section 129.D)

The Hearing Authority may confirm the factual existence of a nonconforming use through petition. The petition must include the following proof of nonconformance.

a. A statement and plans or other illustrations fully describing the magnitude and extent of the nonconforming use.

The petition states the use comprises two buildings, a two-story, 33,584-square foot main building, a 5,489-square foot recreational building, and 25 parking spaces. Also included in the petition is a copy of Site Development Plan SDP 92-91, which is dated July 7, 1992.

b. A statement identifying the date the use became nonconforming to the use provisions of the Zoning Regulations.

The petition states the use became nonconforming on July 12, 2001, the effective date of ZRA-30, which amended or eliminated the old special exception categories in the zoning regulations in the adoption of a new Section 131 for conditional uses. According to the TSR,

ZRA-30 eliminated the group care facility use category for which the Facility obtained approval, and generally replaced it with a new conditional use category for residential care facilities (now Section 131.N.37), which permits a maximum of 16 beds.

c. Documentation substantiating the existence of the use on the date it became nonconforming and clearly demonstrating the continued and uninterrupted use or operation thereof from the specified date to the time of filing the application. The burden shall be on the property owner to establish the existence of the nonconforming use.

The core issue in this case is the lawful existence of the Facility on the July 12, 2001 date it is stated to have become nonconforming. The documentation submitted with the petition to substantiate this includes the decision and orders for BOA Case Nos. 89-51E, BA 94-16E, BA 97-27E. Based on this documentation, the TSR concludes the Petitioner does not meet its burden of proof under Section 129.D.1.c., taking particular note of the May 30, 2006 date of the DILP certificate of use and occupancy for 4475 Montgomery Road. The TSR also relies on the physical absence of the facility on the 2002 DPZ aerial photograph of the Property and the fact that the water and sewer connect date for the Facility is November 1, 2003.

Petitioner's counsel argued through his questions to the Petitioner and the additional documents introduced into evidence during the hearing that there had to be a legal basis for the County's decision to allow the continued processing of the plan, a basis somehow related to the use becoming or being treated as a lawful conforming use.¹ In closing, Petitioner's counsel

¹ Petitioner's Exhibits A-F relate the Petitioner's efforts to establish the use between 2001 and 2003. The BOA first granted the Petitioner a special exception for what was then called a group care facility for the elderly in 1989. In 1994, the BOA granted a special exception for a group care facility and subsequently, two two-year extensions to obtain a building permit. In 1996, the BOA granted the Petitioner's petition to modify the special exception use to reduce the side area.

argued that contrary to the general law concerning the creation of a nonconforming use set forth in Section 129.A, the specific enactment of Section 100.E.3.a.(1) could be read as an operative legal basis for allowing the project to continue being processed and upon completion acquiring awful nonconforming use status. This section provides that "[a]ny conditional use application filed on or before March 5, 2001 shall be subject to the regulations in effect prior to the effective date of Council Bill No. 11-2001."² Petitioner's counsel further suggested the definitional term "use" in Section 103.A.192 could encompass an approved conditional use that was near completion, but not yet actually in use, based on the inclusion of the words "intended" and "intended to be carried on" in the definition as follows.

- USE. a. Any purpose for which a structure or a tract of land may be designed, arranged, *intended*, maintained or occupied; or
- b. Any activity, occupation, business or operation carried on, or *intended to be carried on*, in a structure, or on a tract of land; except that, wells, septic systems and storm water management systems are not considered uses for purposes of these regulations.
- c. The term "permitted use" or its equivalent shall not be deemed to include any nonconforming use.

(Emphasis added.) Petitioner's counsel also finds helpful to his client's circumstances the Section 101.F rule of construction, which provides that "[t]he phrase "used for" includes "arranged for," "designed for," "*intended for*," "maintained for," or "occupied for." (Emphasis added.) Looking to these three provisions, the Petitioner advocates that the actions it took to establish the conditional use could be considered a lawful nonconforming use, pursuant to

² The Hearing Examiner takes note of the zoning history section of this Decision and Order, and the fact that the Petitioner had no applications on file in 2001.

Section 100.E.3.a.(1), because the Petitioner intended to put the property to use as an assisted living facility.

The Hearing Examiner rejects this alternative theory of "intended" nonconforming uses. The word "intended" has two meanings: 1. [adj] – intentional or planned, and 2. [adj] – future. <http://www.merriam-webster.com/dictionary/intended>. Under the first meaning, "intended" has a purposeful quality; under the second, a temporal quality. As deployed in Section 103.A.192, "intended" has the first meaning. This reading is supported by the synonymous phrases for "used for" set forth in Section 101.F: "arranged for," "designed for," "intended for," "maintained for," or "occupied for." These synonyms share the quality of being purpose based.

Any doubt that the phrases "used for" or "intended for" could somehow implicate a future use of a site is removed when we examine the term "use" in the definition of a "nonconforming use" set forth in Section 129.A: "[a]ny lawful *existing use*, whether of a structure or a tract of land, which does not conform to the use regulations of the zoning district in which it is located, either on the effective date of these regulations or as a result of any subsequent amendment thereto." (Emphasis added.). A definitional regulation, this language requires a use to have existed—been purposefully used for, arranged for, maintained for, or occupied for at the time new legislation made the use non-permitted in order for it to be eligible for lawful noncomplying status. The requirement that the use must have actually existed at the time it became non-permitted—made incompatible through the adoption of a new zoning ordinance or an amendment to the zoning ordinance—is the key to the protection

of any vested right (the proposed use) a property owner had when the regulations originally applied to the use ceased.³

Therefore, absent a legislative indication that the County Council deliberately planned the conditional use application filing language in Section 100.E.3.a.(1) to have a meaning encompassing those situations where a use approved in a conditional use decision and order does not yet actually exist when the Zoning Regulations were revised in 2001, the choice of the words "intended," "intended for," or "used for" in other sections of the Zoning Regulations, have no special application to the Petitioner's situation. A legislative loophole as large as that sought through counsel's colloquies would negate the legislative land use policy behind nonconformances.⁴

Based on the evidence of record, the Hearing Examiner concludes the Petitioner has not met its burden under Section 129.D.1.c of documenting the existence of the Facility use on July 12, 2001, the effective date of Zoning Regulations Amendment ZRA-30. The Hearing Examiner agrees with the TSR that the documentation submitted with the petition does not substantiate the existence of the use on July 12, 2001. Neither does the evidence the Petitioner introduced during the hearing. This documentation, Petitioner's Exhibits B-F, generally concerns the

³ The other component is a jurisdiction's interest in reducing nonconformances to protect the legitimate interests of the new zoning ordinance. See, e.g., *Baltimore v. Dembo*, 123 Md. App. 527, 719 A.2d 1007 (1998) (generally discussing the law governing nonconformance).

⁴ Had the Council intended to restrict the effect of the nonconformance provisions to create the type of specific exception urged by the Petitioner, the typical procedure would have been to amend the nonconformance provisions with a proviso, as only subjects expressly exempted by the proviso would have been freed from the operation of the nonconformance regulations.

Petitioner's efforts to avoid the lapse of the decision/s and order/s granted for the then-called special exception for a group care facility pursuant to HCZR Section 131.1.⁵

Lastly, the Petitioner fails its burden of clearly demonstrating the continued and uninterrupted use or operation of the Facility from the specified date the use is stated to have become nonconforming to the time of filing the application. The Petitioner submitted three documents with the petition to demonstrate the continued and uninterrupted use or operation of the Facility from July 12, 2001 to the time of filing the application: a May 30, 2006 DILP certificate of use and occupancy for 4475 Montgomery Road, and two two-year year licenses from the Maryland Office of Health Care Quality, one for 2008-2010 and the second for 2010-2012, Shangri-La Homes. An almost five-year gap exists between the stated date of nonconformance and the earliest proof of use, the DILP certificate of use. The Petitioner fails its burden of proof to establish the continued and uninterrupted use or operation of the use.

II. Extension, Enlargement, or Alteration of Nonconforming Uses (Section 129.E)

Because the Petitioner has not met its burden of substantiating the existence of the Facility on the date it became nonconforming, and its continued use or operation, the Petitioner may not seek to extend the use of the Facility by the addition of fifteen beds.

⁵ Prior to July 12, 2001 a decision and order approving a special exception was void unless a building permit conforming to the plans for which the approval was granted is obtained within two years, and substantial construction in accordance therewith is completed within three years from the date of the decision, subject to certain extensions as may be authorized by the BOA.

ORDER

Based upon the foregoing, it is this **25th day of April 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Pradip Ghosh t/a Shangri-La for confirmation of a nonconforming use and enlargement of an assisted living facility in an R-20 (Residential-Single) Zoning District, is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

MICHELLE L. LISTAWKE

Date Mailed: 4/27/11

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.