

RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE COUNTY
NW/Side of Island View Road, 208' SW/Side	*	BOARD OF APPEALS
of Barrison Point Road	*	
2534 Island View Road	*	FOR
15 th Election & 6th Councilmanic Districts	*	BALTIMORE COUNTY
Legal Owner(s): P.G. Developers, LLC	*	
Andrew J. Mattes, III et ux,	*	
Legal Owners/Respondents	*	
Theresa J. Guckert, et al	*	
Petitioner(s)	*	Case No. 11-051-SPH

* * * * *

APPEAL FROM DENIED MOTION TO DISMISS

OPINION AND REMAND ORDER

This matter comes before the Board as an Appeal from a denial of a Motion to Dismiss Petition based on the principles of *Res Judicata* filed by Petitioners Andrew J. Mattes, III and Stephanie L. Mattes, his wife. The Motion was denied by Zoning Commissioner William Wiseman on December 20, 2010 and subsequently appealed to this Board. On May 10, 2011, the Board of Appeals convened for oral argument only on the Motion to Dismiss. Lawrence E. Schmidt appeared on behalf of the Respondents/Appellants. Peter Max Zimmerman of the Office of People's Counsel appeared in opposition to the Appeal as well. The Petitioners appeared *pro se*. Oral arguments were heard and memorandums were submitted by the parties. A Public Deliberation was held on June 22, 2011.

BACKGROUND

The parties to this matter previously appeared before the Zoning Commissioner on a Petition for Special Hearing where the Petitioners attempted to "invalidate a fishing and shell fishing facility for non-conforming use or otherwise." See Case No. 2010-0220-SPH. Following a public hearing that was attended by numerous interested persons, the Zoning Commissioner issued an Order dated April 19, 2010 denying the Petition for Special Hearing and finding that

the Owners/Respondents were entitled to conduct a commercial fishing, crabbing or shell fishing operation on the subject property.

The Petitioners filed a timely Motion for Reconsideration, raising for the time the contention that Respondent “is operating at an intensity that is above that which existed in 1978, and thus does not reflect the intent of the zoning code.” The Motion for Reconsideration was denied and the Zoning Commissioner held that the issue of intensification was not presented or argued at the public hearing on April 8, 2010 and that the Commissioner therefore lacked jurisdiction over that question.

The Petitioners followed this Ruling and filed the a Petition for Special Hearing “to determine whether the scope and intensification of Fishing and Shell fishing allowed by the Use Permit has been exceeded.” The Respondents then filed a Motion to Dismiss arguing that the Petition is barred by *res judicata*, and the Petitioners and Peter Max Zimmerman, People’s Counsel, filed Responses to the Motion. The parties appeared for a public hearing on the Motion to Dismiss and presented oral argument to the Zoning Commissioner.

At the conclusion of oral arguments before the Zoning Commissioner and the submission of memoranda by the parties, the Zoning Commissioner denied the Motion to Dismiss, ruling that *res judicata* did not bar the Petition at issue. In denying the Motion to Dismiss the Zoning Commissioner included the following caveat:

While ordinarily an appeal is only available when a final order disposes all claims between the parties, interlocutory orders in the Circuit Court arena are immediately appealable under three (3) exceptions. Those exceptions are: “appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine.” *Schuele v. Case Handyman and Remodeling Services, LLC*, 412 Md. 555, 556 (2010).

In the case before me, I find that my denial of the Respondents’ Motion to Dismiss is immediately appealable under the collateral order doctrine, which

requires that an interlocutory order: (1) conclusively determines a disputed question, (2) resolves an important issue, (3) resolves an issue that is completely separate from the merits of the action, and (4) would be effectively unreviewable if the appeal had to await the entry of a final judgment. *Id.* at 572.

Question

Is it permissible for this Board to consider an interlocutory appeal of an Order of the Zoning Commissioner Denying a Motion to Dismiss based on *res judicata* or *collateral estoppel*?

In advising the Respondent to Appeal his Denial of their Motion to Dismiss, the Zoning Commissioner cites the “Collateral Order Doctrine” found *Schuele v. Case Handyman and Remodeling Services, LLC*, 412 Md. 555, 556 (2010) as justification to do so. In applying the factors enumerated in *Schuele* to the matter at bar, it does appear at first blush that the Denial of the Motion to Dismiss on the basis of *res judicata* or *collateral estoppel* does “conclusively determine a disputed question, resolve an important issue, and resolve an issue that is completely separate from the merits of the action.” However, this matter is procedurally distinguishable from *Schuele*, due the role of the Board of Appeals in matters appealed from decisions of the Zoning Commissioner.

The major distinguishing factor between *Schuele* and the case at bar lies in the fact that the Board of Appeals hears appeals involving Petition for Special Hearing matters on a *de novo* basis. *See* BCZR Section 501.6. The parties in *Schuele* were limited to appealing on an “issues/record appeal” basis to the Court of Special Appeals, or in the case of *Schuele*, by Writ of Certiorari to the Court of Appeals. The parties in this matter are guaranteed a trial *de novo* before this Board. Due to the ability of the parties to file a trial *de novo* appeal, no issues “would be effectively unreviewable if the appeal had to wait until the entry of a final judgment.” Of course, if the Zoning Commissioner had granted the Motion to Dismiss, such a ruling would constitute a final ruling, and the entire matter could be appealed immediately to this Board for a

analogous situation arises in District Court criminal matter. If a criminal defendant loses a motion to suppress a confession, the ruling is not immediately appealable to the Circuit Court due to the fact that the defendant is entitled to a trial de novo of the entire matter once the court has entered its final ruling. Accordingly, the issue of whether the case at bar should have been dismissed due to *res judicata* is not yet ripe for review by this Board and the case should continue to be heard on the merits by the Zoning Commissioner.

CONCLUSION

The Board finds that an interlocutory appeal from the Zoning Commissioner of an Order Denying a Motion To Dismiss based on the principles of *res judicata* is not reviewable by this Board until the completion of the entire case before the Zoning Commissioner.

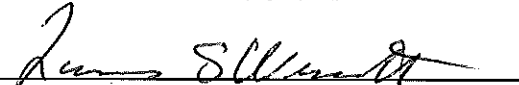
ORDER


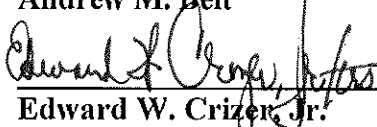
THEREFORE, IT IS THIS 2nd day of August, 2011 by the County Board of Appeals of Baltimore County

ORDERED that this matter be REMANDED to the OFFICE OF ADMINISTRATIVE HEARINGS for further adjudication on the merits.

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 S. Wescott, Chairman


Andrew M. Belt

Edward W. Crizer, Jr.