

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
S side of Shepperd Road, 228 feet E of the		
c/l of Monkton Road	*	DEPUTY ZONING
10 th Election District		
3 rd Councilmanic District	*	COMMISSIONER
(2013 Shepperd Road)		
	*	FOR BALTIMORE COUNTY
James and Barbara Frack		
<i>Petitioners</i>	*	Case No. 2009-0133-SPH

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner for consideration of a Petition for Special Hearing filed by James and Barbara Frack, the legal property owners. Special Hearing relief is requested in accordance with Section 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to confirm the existence of a non-conforming use to permit a three-unit dwelling on the subject property. The subject property and requested relief are more fully described on the site plan that was marked and accepted into evidence as Petitioners’ Exhibit 1.

Appearing at the requisite public hearing in support of the requested special hearing relief were Petitioners James and Barbara Frack, and Arnold Jablon, Esquire, attorney for Petitioners. Also appearing in support of the requested relief was Gene Raphel, Petitioners’ surveyor and land use consultant. Appearing as interested citizens were nearby neighbors William and Karen Turner of 2016 Shepperd Road and Mary Partridge of 2000 Monkton Road.

Testimony and evidence offered revealed that the subject property is an irregular-shaped property consisting of approximately 8.434 acres. The irregular shape is exacerbated by the split zoning of the property wherein the area zoned R.C.2 (1.226 acres) is a small portion located on the north side of Shepperd Road and the area zoned R.C.7 (7.208 acres) is the larger portion

located on the south side of Shepperd Road, and is bordered to the south by Monkton Road in the Monkton area of northern Baltimore County. The property as a whole consists of one large lot and has several improvements thereon. On the south side of Shepperd Road, this includes the existing two-story wood frame dwelling that is the subject of the special hearing request, as well as an existing garage and one large and one small shed, and a well and septic pump. Located across the street, on the north side of Shepperd Road, are dry wells that serve the existing two-story dwelling.¹ Marked and accepted into evidence as Petitioners' Exhibit 2 was a Zoning Map showing the unusual configuration of the zoning boundaries, and in particular the split zoning of the subject property. Also marked and accepted into evidence as Petitioners' Exhibit 3 was an aerial photograph showing the proximity of the improvements on the south side of Shepperd Road.

The two-story dwelling is actually used as three separate units and has been used as such for almost the last 50 years. At this juncture, Petitioners desire to legitimize the existence of the three unit dwelling as a nonconforming use in the R.C.7 Zone. Petitioners' attorney, Mr. Jablon, indicated that as part of the nonconforming use, Petitioners also seek to legitimize the use of a portion of the R.C.2 Zoned area of the property (on the north side of Shepperd Road) for the location of the dry wells that serve the three unit dwelling, also as a nonconforming use.²

In support of the special hearing request, Mr. Jablon proffered the testimony concerning the historical use of the property, and supplemented the proffer with additional documentary

¹ A dry well is an underground structure that disposes of unwanted water, most commonly storm water runoff, by dissipating it into the ground, where it merges with the local groundwater. Dry wells often consist of a pit filled with gravel, riprap, rubble, or other debris that receives water from one or more entry pipes or channels at its top and discharges the same water through a number of small exit openings distributed over a larger surface area at the side(s) and bottom of the dry well.

² Except for the location of the dry wells as shown on the site plan, there are no other improvements on the R.C.2 Zoned area of the property. It should also be noted that Petitioners have requested a minor subdivision of this "upper" area of the property -- in order to ultimately build a house on that potentially newly created lot.

evidence. In 1961, there was an existing barn on the property and the owner at that time, Robert F. Fahy, decided to convert the barn into a three unit dwelling. A copy of the building permit obtained by Mr. Fahy was marked and accepted into evidence as Petitioners' Exhibit 4. The permit is dated April 19, 1961 and indicates the use of the building to "convert barn into 3 apartments." Mr. Jablon indicated it is important to note that at the time of the conversion of the barn to a dwelling, the County did not have "comprehensive maps" and although there were Zoning Regulations, not every area of the County -- especially the northern rural areas -- had comprehensive zoning. At the time, the area that included the subject property was referred to as "Residual R 6." As part of his planning for the conversion of the barn, Mr. Fahy requested that a County representative conduct a percolation test on the property to determine the suitability for three apartments with a total of six bedrooms with estimated flows and absorption rates. A letter dated March 22, 1961 from the County's Department of Permits and Licenses that was marked and accepted into evidence as Petitioners' Exhibit 5 indicated the proposed septic system was adequate and was designed with a leaching area safety factor. As part of the 1961 building permit, Mr. Fahy had to place dry wells (for the residential septic) on the "upper" portion of the property via an underground pipe below Shepperd Road. A copy of a permit dated July 26, 1961 from the State Roads Commission of Maryland that was marked and accepted into evidence as Petitioners' Exhibit 6 granted Mr. Fahy permission to dig under the road to connect the dry wells to the new dwelling.

Following conversion of the barn into a dwelling with three units, Mr. Fahy and his family lived in one of the units and rented the other two. This was verified in an affidavit dated December 8, 2008 from Robert Fahy, Jr. that was marked and accepted into evidence as Petitioners' Exhibit 7. The affidavit indicates that the units were rented continuously until at

least October 1987 when his parents moved out. Another affidavit from Petitioner Mr. Frack's mother, Reba Frack, dated December 11, 2008 was marked and accepted into evidence as Petitioners' Exhibit 8. This affidavit verifies Ms. Frack's knowledge of the subject property and indicates the dwelling has been used as three units from February 1965 to the present time. In addition, tax records from the State Department of Assessments and Taxation that were marked and accepted into evidence as Petitioners' Exhibit 9 verify the existence of the three apartments. Mr. Jablon also indicated that Petitioners have owned the subject property since 1987, and that the dwelling has been used and occupied as three units continuously and without interruption since that time.

The remaining documentary evidence reflects copies of photographs of the property during the ensuing years. In particular, they include: photographs from the News American newspaper taken in 1962 that were marked and accepted into evidence as Petitioners' Exhibit 10 showing the 18th century barn before it was converted into a dwelling and the three apartments thereafter; photographs taken in 1964 that were marked and accepted into evidence as Petitioners' Exhibits 11 and 12 showing the converted barn; photographs taken in 1984 that were marked and accepted into evidence as Petitioners' Exhibit 13 showing the three "townhouse" style apartments within the dwelling; and photographs taken in January 2009 that were marked and accepted into evidence as Petitioners' Exhibits 15A through 15D showing the dwelling as three units as it appears presently. Finally, Mr. Jablon submitted the relevant provisions of the 1955 Baltimore County Zoning Regulations for Accessory Buildings in Residence Zones -- specifically in the R.6 Zone -- that was marked and accepted into evidence as Petitioners' Exhibit 16. Mr. Jablon indicated that based on the conversion table of one-family dwellings in Section

402.2 of the 1955 Regulations, the subject dwelling met all of the applicable lot width, lot area, and setback requirements.

Testifying as interested citizens were nearby neighbors Mr. and Mrs. Turner, who live on the north side of Shepperd Road adjacent to the “upper” portion of the subject property and across the street from the existing three unit dwelling, and Ms. Partridge who lives on the south side of Shepperd Road adjacent to the larger “lower” portion of the subject property. They expressed frustration with the manner in which Petitioners were moving through the minor subdivision process and the instant request for zoning relief. They do not feel that Petitioners have been completely forthright or above-board in their plans for the property. In particular, Mr. and Mrs. Turner indicated that they have lived across the street from Petitioners for the last several years. They also indicated that the septic system located on their side of Shepperd Road that serves the subject dwelling had been failing during that time and practically “out of nowhere” all of a sudden work crews were digging on the property adjacent to the Turner’s property -- as it turns out to replace the aging septic system. It was only by their own investigation through the County Department of Environmental Protection and Resource Management (“DEPRM”) and the Department of Permits and Development Management (“PADM”) that the Turner’s became aware of Petitioners’ intentions with regard to the proposed minor subdivision and obtained a copy of the proposed minor subdivision plan, which was marked and accepted into evidence as Protestant’s Exhibit 1. They also obtained a copy of the septic system plan filed with DEPRM, which was marked and accepted into evidence as Protestant’s Exhibit 2. Ms. Partridge essentially echoed the sentiments and Mr. and Mrs. Turner in feeling that she was essentially “in the dark” as to Petitioners’ plans. The Turner’s and Ms. Partridge also acknowledged that, except for the above-described issues, they generally did not

have evidence to present concerning the issue of the requested nonconforming use of the dwelling as three units, together with the existing dry wells. They did express concerns over whether the septic system could accommodate the three units with the number of bathrooms and anticipated uses in each unit.

The Zoning Advisory Committee (“ZAC”) comments were received and are made part of the record of this case. Comments were received from the Office Planning dated November 28, 2008 indicating the project is being reviewed as a minor subdivision (07087 M) as referenced in the minor subdivision comments dated October 16, 2008 contained within the case file, and indicating that if the septic area is located in a different zone, a special hearing is typically required. Comments were received from DEPRM dated December 23, 2008 which indicate that Article 33, Title 3 and Title 6 of the Baltimore County Code (“B.C.C.”) may require compliance for any further development of this property.

Considering of all the testimony and evidence presented, I am persuaded to grant the special hearing relief. Although I understand on the one hand the legitimate concerns of the Turner’s and Ms. Partridge as to the work that has been undertaken on the septic system and their uneasiness over Petitioners’ proposed minor subdivision, Petitioners have, on the other hand, presented credible and persuasive evidence to be entitled to the relief they are seeking for confirmation of the nonconforming use of the dwelling as three units in the R.C.7 Zone and the use of the dry wells in the R.C.2 Zone, but both located on the same lot of record. Perhaps this apparent lack of communication between the parties can be remedied in the future. That said, the evidence is undisputed that the previous barn was converted in 1961 to a dwelling with three units and has been used continuously as such, without interruption. The evidence also indicates that permits were obtained from the County and permission granted by the State for the

installation of the dry well system. The dwelling also met the applicable R.6 Regulations at that time and is entitled to recognition as a legal nonconforming use.

In addition, as to location of the dry wells in a different Zone on the property, on this issue, Section 1A00.5 of the Zoning Commissioner's Policy Manual ("Z.C.P.M.") expounds upon Section 1A00.5 of the Zoning Regulations pertaining to tracts divided by R.C. Zone boundaries. As to the instant matter, Section 1A00.5.b of the Z.C.P.M. states that, for lots divided by Zone lines, "the following guidelines have been formulated so that his matter can be handled consistently." Subsection 1(c) states that "[t]he well and septic system must be located in the same zone as the house." Obviously, the existing dry wells are not in the same zone as the dwelling; however, under the definition of "nonconforming use" in Section 100.1 of the B.C.Z.R. and "continuation of nonconformance" in Section 104.1 of the B.C.Z.R., in my view, the location of Petitioners' dry wells in a different Zone than the principle dwelling is nonconforming and should be permitted to continue as such along with the three unit dwelling.

Pursuant to the advertisement, posting of the property, and public hearing on this petition held, and after considering the testimony and evidence offered, I find that Petitioners' request for special hearing should be granted.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County, this 18th day of February, 2009 that Petitioners' request for Special Hearing relief filed in accordance with Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) to confirm the existence of a non-conforming use to permit a three-unit dwelling on the subject property be and is hereby GRANTED; and

IT IS FURTHER ORDERED that in conjunction with the aforementioned relief, Petitioners' request to permit the dry wells to be located in a different zone than the dwelling as a nonconforming use be and is hereby GRANTED, subject to the following:

1. Petitioners may apply for permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at its own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition.
2. Article 33, Title 3 and Title 6 of the Baltimore County Code ("B.C.C.") may require compliance for any future development of this property.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

____SIGNED_____
THOMAS H. BOSTWICK
Deputy Zoning Commissioner
for Baltimore County

THB:pz