

IN RE: PETITION FOR SPECIAL HEARING

E side of York Road; SE corner of York Road
and Burke Avenue
9th Election District
5th Councilmanic District
(12 York Road)

Wallace A. Eddleman and Aaron M. Eisenfeld
Petitioners

* BEFORE THE
* DEPUTY ZONING
* COMMISSIONER
* FOR BALTIMORE COUNTY
* **CASE NO. 2010-0167-SPH**

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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 the legal property owners, Wallace A. Eddleman and Aaron M. Eisenfeld. Petitioners request Special Hearing relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) to approve the continued use of the subject property as a two apartment structure as a valid non-conforming use; and such additional relief as the nature of this case as presented at the time of the hearing on this Petition may require within the spirit and intent of the Baltimore County Zoning Regulations ("B.C.Z.R.") and prior approvals for 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 Wallace A. Eddleman and Aaron M. Eisenfeld, and their attorney, Howard L. Alderman, Jr., Esquire. Also appearing in support of the requested relief were Bruce E. Doak with Gerhold, Cross & Etzel, Ltd., the registered property line surveyor who prepared the site plan, and Frank P. Morabito with Morabito Consultants, Inc., Petitioners' structural engineering consultant. The nature of the case and the relief requested generated significant interested in the community and several interested citizens opposed to the relief attended the hearing, including

Richard Parsons of 412 Woodbine Avenue, Helen Kiplinger of 1 East Burke Avenue, and Paul Hartman of 18½ Cedar Avenue in Towson.

Testimony and evidence presented revealed that the subject property is irregular in shape and consists of approximately 2,854 square feet or 0.066 acre, more or less, zoned D.R.5.5. The property is located at the southeast corner of York Road and Burke Avenue in downtown Towson. As shown on the site plan and the aerial photograph that was marked and accepted into evidence as Petitioners' Exhibit 2, the property is improved with a three-story end of group row house constructed of brick and wood siding. Although from the front, the structure appears to be two stories because the slope of the property is raised to the entrance from York Road, it has frontage on the ground floor along Burke Avenue and the concrete alley to the rear, making it less of a "basement" level and more akin to a "first floor." This is shown on the street level photograph that was marked and accepted into evidence as Petitioners' Exhibit 3.

In his opening remarks, Petitioners' attorney, Mr. Alderman, indicated that the building has always been two separate apartments -- on the second and third levels. The first floor had historically been used commercially, having been a hair salon many years ago and then a surf shop. Recently, a complaint to the Baltimore County Bureau of Code Inspections and Enforcement alleged that the property had been illegally converted from a dwelling to two apartments. Mr. Alderman further explained that in response to a citation issued in September 2009, Petitioners undertook an investigation into the history of the property and found documentation indicating the building was originally constructed as two separate apartments. Petitioners also engaged an engineering consultant to determine if the original construction was consistent with two separate apartments. As a result, Petitioners filed the instant Petition for Special Hearing seeking confirmation that the existing two apartment structure is a valid nonconforming use.

The first witness to testify in support of the requested relief was Bruce E. Doak. Mr. Doak is a professional property line surveyor with Gerhold, Cross & Etzel, Ltd. He has a degree in surveying and has been licensed in the State of Maryland since 1989. He has been involved in the review and preparation of site plans for the past 25 years and has reviewed over 500 plans during that time. He has testified as an expert before various Baltimore County tribunals, including this Commission, at least 200 times and was offered and accepted as an expert in land use and zoning issues and interpretation of the Zoning Regulations. He prepared the site plan that shows the subject property's existing conditions and reiterated Mr. Alderman's opening remarks as to the size and location of the property and the improvements thereon. Mr. Doak indicated that through his personal and professional experience in the Towson area for the past 25 years, he has observed that the subject structure has been utilized as second and third floor apartments, as well as the commercial use on the first floor.

To further illustrate the existing conditions, Mr. Doak submitted a site plan to accompany photographs that was marked and accepted into evidence as Petitioners' Exhibit 4, and the photographs themselves were marked and accepted into evidence as Petitioners' Exhibits 5A through 5H. These photographs show a well maintained row house style structure with a number of windows and architectural accents -- including a prominent stone retaining wall -- consistent with a structure built in the 1930's. There is a first floor entrance at the corner of York Road and Burke Avenue, and two separate entrance ways located in front on the second floor. There is also another first floor entrance on the Burke Avenue side, as well as an attached one car garage adjacent to the concrete alley to the rear.

Mr. Doak discussed the zoning history of the property and indicated that the property is presently zoned D.R.5.5. He indicated that when the structure was built in 1932, there was no zoning on the property since there was no zoning in Baltimore County until 1945. In 1945, the

County first adopted Zoning Regulations and in 1955, the Regulations were updated to include specific residential zones. In particular, the subject property was zoned R.6 as per the 1955 Regulations, which permitted one and two family dwellings. In 1970, under Bill No. 100, the current D.R. zones were created and adopted in Baltimore County. Mr. Doak indicated that based on his observations of the interior and exterior of the structure, it appears to have been constructed as two separate apartment units on the second and third floors, with a separate first floor that had commercial uses for a number of years. Finally, he offered his expert opinion that the use of the structure as two apartments -- a use that has been constant since it was constructed in the 1930's -- would not be detrimental to the health, safety, or general welfare of the locale, nor would it have any detrimental impacts on the criteria set forth in Section 502.1 of the B.C.Z.R. He also indicated that the use as two apartments would actually be less intense than the density would otherwise permit in the D.R.5.5 Zone.

Next to testify was Petitioners' consulting engineer, Frank P. Morabito. A copy of his resume was marked and accepted into evidence as Petitioners' Exhibit 6. Mr. Morabito is a registered structural engineer in 23 states -- including Maryland -- and is President of Morabito Consultants, Inc. He has been involved in the design and supervision of over 2,600 buildings and includes the structural design of all types of building systems. His experience also extends to areas of forensic engineering, in terms of evaluating functionality and original design and construction of improvements. It is in this area that his experience is most germane to this case. He was offered and accepted as an expert in structural engineering.

Mr. Morabito indicated he is familiar with the site, having walked through and evaluated the property and the building on January 26, 2010. He inspected the premises with an emphasis on determining how the improvements were originally built and configured. Based on his experience and expertise, he offered his opinion that the first/ground floor was originally

constructed as a retail space with storage in the rear. He also concluded that the second and third floors were built for residential occupancy as two separate apartments and not converted as such at a later date.

Mr. Morabito based this opinion on the existing structural configuration and noted that no alterations have been made to the building to suggest changes from a one unit dwelling to two apartments. Specifically, as to the exterior, he noted that the brick has a consistent color and texture throughout and does not appear to have been changed or modified. The siding consists of asbestos shingles that are also intact and have not been changed since they were originally installed and are common for the era in which the structure was built. The windows are original single-pane with hardware from that period and without insulation, and the concrete walkway and retaining wall exhibits the wear and tear that suggests it has been there for the last 70-80 years.

As to the interior, Mr. Morabito indicated that the first floor metal ceiling appears to be in very good shape and is of the type that was installed in the 1930's. As with other aspects of the structure, it appears to be unchanged since originally installed. The second and third floor apartments are not connected and have their own private entrances on the second floor. He noted that it would be unusual for a single-family dwelling to have two main entrances off the front. The stairway leading to the third floor apartment appears to be original, and none of the features of the interior, including the walls, plumbing, and layout, suggests that the stairway or the interior rooms on the second and third floors were added later. Finally, the hardwood floors appear untouched and original, as do the tile floors and the plaster walls. In sum, Mr. Morabito believes that all the exterior and interior features are consistent with a building that was built originally as two separate apartments on the second and third floors.

The final witness to testify in support of the relief was Aaron Eisenfeld, one of the two owners of the subject property. Mr. Eisenfeld testified that he and Mr. Eddleman purchased the property in 2005 and one of the reasons they did so was because it was marketed for sale as a two apartment unit. They have rented the building as two apartments and have complied with the County's annual licensing requirements to operate as a rental unit. Each apartment has two bedrooms, with a bathroom, living room, dining room, and kitchen. The parking pad adjacent to the alley and Burke Avenue is used by tenants -- one space for each apartment. As shown in the photographs that were referenced earlier, trash containers for each unit are located on the side of the property fronting Burke Avenue.

Mr. Eisenfeld and his attorney, Mr. Alderman, recounted the chain of title for the property and introduced several deeds from years past, which were marked and accepted into evidence as Petitioners' Exhibits 7, 8, 9, 10, and 11, respectively. This history can be summarized as follows: Petitioners purchased the property on January 6, 2005 from Eugene L. Kibbe, III and his wife, Catherine Kibbe. Petitioners then executed a subsequent deed on November 6, 2007 in order to convert ownership of the property from a joint tenancy to tenants in common. Moving back many years and not long after the structure was built in 1932, the property was conveyed on April 27, 1936 from John and Margaret Hill to Marbury B. Fox, Sr. and his wife, Florence H. Fox. Marbury B. Fox, Sr., who died in 1959, and Florence H. Fox, who died in 1968, conveyed the property to their children, Thomasine Fox Kibbe, Dorothy Fox Patterson, and Marbury B. Fox, Jr. Marbury B. Fox, Jr. died in 1986 and devised his one third interest in the property to the Trustees (Lees T. Fox, H. Anthony Mueller, and Mercantile Safe Deposit and Trust Company) of the Residuary Trust of his Will. In 1989, Dorothy Fox Patterson conveyed her one third interest and the Trustees of the Will of Marbury B. Fox, Jr. conveyed its one third interest to Eugene L. Kibbe, III, with Thomasine Fox Kibbe still owning the one third that was conveyed to her by her

parents. On December 31, 1992, Thomasine Fox Kibbe conveyed her remaining one third interest to Eugene L. Kibbe, III, giving him the 100% ownership of the subject property that was conveyed to Petitioners in 2005.

Of particular relevance to the instant matter is the written statement provided by Thomasine Fox Kibbe, which was marked and accepted into evidence as Petitioners' Exhibit 13. As recounted above, Thomasine Fox Kibbe was the daughter of Marbury B. Fox, Sr. and Florence H. Fox, who acquired the property in 1936. In her statement, Ms. Kibbe indicates that to her knowledge, the three-story structure was built as a row house with two apartments, each with two bedrooms, and Hax Beauty Salon on the first floor. After her father acquired the property, he owned and managed the property until his death in 1959 and then the property was managed by his son, Marbury Fox, Jr., and later by grandsons. For the next 50 years, there were no problems or complaints and the building continued to be used as two apartments and a beauty salon. The beauty salon did not renew its lease when parking on York Road and Burke Avenue became a problem. In 1986, a surf shop opened, but after a year, it was determined that the store front could not be used in that manner and has since been vacant for the last 20 years. Ms. Kibbe also reiterated that the building was not "converted" from a single-family dwelling to two apartments. It was built as two apartments and was owned by her family for about 60 years and operated as two apartments during her family's period of ownership.

As indicated earlier, several interested citizens from the nearby community appeared in opposition to the requested relief, including Richard Parsons, Helen Keplinger, and Paul Hartman. All of these individuals are active in the Towson community and Mr. Hartman is President of the Aigburth Manor Association of Towson, the community association that surrounds the subject property that includes Burkleigh Square. He is also a Delegate with the Greater Towson Council of Community Associations, Inc. (GTCCA), an umbrella organization

representing the interests and concerns of more than thirty community associations in the Greater Towson area. To summarize their testimony, these communities have always opposed and objected to the conversion of dwellings into multi-family apartments. Multi-family apartments in proximity to residential areas have an adverse effect on these single-family communities, in particular regarding trash and debris, rodent infestation, and parking. Frequently, these apartment units have more than the permitted number of unrelated tenants and the growth of nearby Towson University and the lack of student housing has exacerbated the problem. They generally opposed the use of the subject structure for two apartments.

In addition, Edward T. Kilcullen, Jr., President of the GTCCA, submitted a letter of opposition dated January 25, 2010, which was marked and accepted into evidence as Protestants' Exhibit 1. In his letter, Mr. Kilcullen indicated that all on-street parking in front of the row of townhouses that includes the subject property was eliminated with the widening of York Road a few decades ago. As a result, there is insufficient parking for a two-unit building resulting in added competition for parking in the community. Towson University's significant enrollment growth and severely lagging student housing has made the Burkleigh Square community a target for investors wishing to capitalize on the demand for housing. The community is nearly 50% rental properties with the majority of these properties occupied by college students. This has had a negative impact on the community with more and more owner-occupied homes turning over to investor-owned rental properties and a multitude of related code enforcement and behavioral problems. Allowing this property to continue as a nonconforming two-apartment property would continue to put added stress on the Burkleigh Square community and contribute to the growing trend of single-family homes being converted to rental properties. Further, it would set a dangerous precedent for other nonconforming uses in the area, which has numerous such properties that could seek similar relief should this request be granted. In sum, the Greater

Towson Council of Community Associations strongly opposed Petitioners' request and respectfully requested that it be denied.

The Zoning Advisory Committee (ZAC) comments were received and are contained within the case file. Comments were received from the Office of Planning dated January 15, 2010 which indicates they do not oppose Petitioners' request provided the proof and evidence can be demonstrated to the Zoning Commissioner that the nonconforming use was lawfully established and not subject to any violations. Comments were received from the Bureau of Development Plans Review dated December 15, 2009 which indicates that the required number of off-street parking spaces should be shown on the plan if they exist or be provided if they do not exist.

It is noteworthy that the consistent theme in cases such as this, particularly involving properties with structures used as multi-family units located adjacent to the more family oriented neighborhoods with single-family dwellings, is the desire of the communities to see that single-family dwellings remain as such, versus the desire of the owners of multiple apartment structures to utilize them as rental apartments to the extent permitted by law. And what makes the situation even more volatile is the influx of Towson University students who seem to make up the majority of tenants in these rental units, and who bring their own brand of youthful "enthusiasm" to the nearby residential communities.

Generally, this Commission has recognized and given great deference to the concerns of the greater Towson communities where petitioners have sought to convert existing single-family dwellings into rooming houses or multi-family apartments. In a number of cases, this Commission has denied requests to permit a rooming or boarding house based on the adverse

impact such a use would have on stable, single-family communities.¹ In the instant matter, however, the request is not to permit a rooming house or allow a single-family dwelling to be converted to multiple apartments. Indeed, Petitioners are not seeking to change, alter, or expand the existing use and have acknowledged that the existing use would not be permitted by today's Regulations. Rather, Petitioners seek relief to permit the continued use of the existing building as a two apartment structure under a valid non-conforming use.

A nonconforming use is defined in Section 101 of the B.C.Z.R. as “[a] legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such use.” In addition, Section 104.1 of the B.C.Z.R. states that “[a] nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations, provided that upon any change from such nonconforming use to any other use whatsoever, or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.” It is well settled that nonconforming uses are not favored under the law. It is also recognized that nonconforming uses are contrary to the zoning scheme established by the Zoning Regulations and that the restrictions on such uses is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *See, County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259 (1982). Moreover, it is the burden of a petitioner to prove the nonconforming use during the period of time at issue.

¹ *See*, Case No. 2010-0042-SPH (denied request to permit rooming house for maximum of four unrelated persons at 115 Burke Avenue in Towson); Case No. 2007-0294-SPH (denied request to permit a rooming/boarding house at 7610 Knollwood Road in Towson).

In 1945, the County first adopted Zoning Regulations and delineated four residential (A, B, C, and D) one commercial (E), and two industrial (F and G) zones. On March 31, 1955, the Regulations were updated to include specific residential zones to account for single-family and multi-family residences, as well as more precise classifications to deal with the minimum size required for a lot. In both the 1945 and 1955 Regulations, nonconforming uses were recognized and permitted to continue with certain exceptions and restrictions.

Turning now to the instant matter, the evidence indicates that the row house style building was constructed in 1932. The undisputed and uncontradicted expert testimony indicates that the layout, configuration, and construction materials of the building have remained unchanged since their original construction, well before the initial adoption of Zoning Regulations in Baltimore County in 1945, or their comprehensive re-adoption in 1955. It is also clear that this case comes before me, not as an instance where a single-family dwelling was subsequently converted to a multi-family dwelling, but where the original structure was constructed and used as two separate apartments, well before the adoption of the Zoning Regulations in Baltimore County.

In addition, the deed history of the property reveals that it had been in the Fox/Kibbe family from 1936 through 2005 -- a period of almost 70 years. The uncontroverted written testimony of Thomasine Fox Kibbe indicates that during the time her family owned the property, the building was used continuously as two separate apartments. Petitioners have continued that use through the present time. Thus, it is clear that the nonconforming use presented in this case predates, by a substantial period, the adoption of the B.C.Z.R. on March 31, 1955 and the earlier Regulations in 1945, and I am compelled to grant Petitioners' requested relief. Although I am mindful of the concerns of the community -- and those concerns are certainly understandable --

in my judgment, based on the testimony and evidence presented, Petitioners have met their burden at law and are entitled to the special hearing relief as a nonconforming use.

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

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County, this 14th day of April, 2010, that Petitioners' request for Special Hearing relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to approve the continued use of the subject property as a two apartment structure as a valid non-conforming use, be and is hereby **GRANTED** subject to the following condition:

1. Petitioners may continue the aforementioned nonconforming use (subject to the nonconforming use provisions of the B.C.Z.R.) and apply for any applicable permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their 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 discontinue the nonconforming use of the property as a two apartment structure.

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

THOMAS H. BOSTWICK
Deputy Zoning Commissioner
for Baltimore County

THB:pz