

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
NW/Side Island View Road, 208' SW/Side of		
Barrison Point Road	*	ZONING COMMISSIONER
(2534 Island View Road)		
15 th Election District	*	OF
6 th Council District		
	*	BALTIMORE COUNTY
Andrew J. Mattes, III, et ux,		
<i>Legal Owners/Respondents</i>	*	
Theresa J. Guckert, et al	*	Case No. 2010-0220-SPH
<i>Petitioners</i>		

* * * * *

MEMORANDUM AND ORDER

STATEMENT OF THE CASE

This zoning case involves 2534 Island View Road, formerly 466 Barrison Road, in eastern Baltimore County. On October 5, 1977, Robert J. Romadka, Esquire, on behalf of the then property owners, D. Franklin Beck, Sr. and Mae M. Beck, his wife, and their son, Daniel F. Beck, Jr., filed an application for a Zoning Use Permit and site plan for a “Commercial fishing, crabbing and shellfishing operation”.¹ This application was submitted consistent with Baltimore County Council Bill No. 98-75 and Section 500.4 of the Baltimore County Zoning Regulations (B.C.Z.R.). An inspection of the property was conducted on June 13, 1978. On October 9, 1978 Zoning Commissioner S. Eric DiNenna (also deceased) issued a Use Permit to use 50% of the land “as a secondary commercial fishing, crabbing and shellfishing operation”. This matter now comes before the undersigned Zoning Commissioner for consideration of a Petition for Special Hearing filed by adjacent neighbor, Theresa J. Guckert (2530 Island View Road), and

¹ D. Franklin Beck (12/1/79) and Mae Beck (7/14/08) departed this world vesting title to the property in Daniel F. Beck, Jr. who sold the land and improvements to Andrew J. Mattes, III and Stephanie L. Mattes, his wife, on February 3, 2009.

interested residents David M. Donovan and James S. Brown (2502 Island View Road).² As filed, Petitioners request a special hearing “To invalidate the fishing and shell fishing facility for non-conforming use or otherwise”. The requested relief is more fully set forth in a notebook containing 22 tabbed attachments that was submitted and accepted into evidence as Petitioners’ Exhibit 1.

The issues presented in this case generated significant interest on the part of commercial fishermen and members of the Baltimore County and Maryland Waterman’s Association. A large number of individuals from as far away as Stevensville and Queenstown appeared and/or testified in opposition to the Petitioners’ request. Due to limitations of time and space, a complete listing of all those association members identified on the “sign-in sheets” circulated at the hearing cannot be set out here; however, it needs to be noted that Lawrence E. Schmidt, Esquire represented respondents Andrew and Stephanie Mattes and presented as witnesses Permits and Development Management’s Code Enforcement Inspectors Gary C. Freund³ and M. Stuart Kelly, commercial crabbers Daniel F. Beck, Darren Hallock, Gene Williams, Joe Rohlfins, Marcus Blake, Harry Grauling, Ray Bonczewski and Charles A. Wagerman, Jr. Letters of support were also offered as Community/Respondents Exhibit 2. It is clear that the request made by the Petitioners has caused sharp lines to be drawn, both pro and con.

² Mr. John H. Bean, Sr. also appeared in support of the Petitioners. Letters were received from Island View Road neighbors who support the termination of a commercial fishing and shellfishing operation in this community given its adverse impacts to the environment, their right to enjoy peace and quiet, increased traffic and the unsightliness of stored crab pots and equipment that diminish property values – especially for those residents that live next to or drive pass the fishing operation to reach their homes.

³ Gary Freund was employed in the County’s Office of Planning and Zoning in the mid-1970’s. On September 19, 1978, he approved site plans for the crabbing and shellfishing operations at 294-C Schaffers Road and 466 Barrison Road (2534 Island View Road). Both applications for these locations identified Daniel Beck as the “lessee or applicant”.

QUESTIONS PRESENTED

(1) Whether the Use Permit granted by Commissioner DiNenna was appropriate and effective, and if so, does it run with the land so as to inure to the benefit of a subsequent purchaser who is also a commercial fisherman? (2) Does a Use Permit survive periods of non-use or does a discontinuance bring into play the non-conforming use provisions of B.C.Z.R. Section 104.1?

RELEVANT LAW AND BALTIMORE COUNTY ZONING REGULATIONS

The following County zoning regulations and Council Bills are contained in the case file: Council Bills 98-75 and 139-83; the 1978 Zoning Commissioner's Order and site plan; B.C.Z.R. Sections 101, Definition of Non-Conforming Use; 104, Non-Conforming Uses, and 500.4, Issuance of Use Permits. Not contained in the file, but applicable is the Annotated Code of Maryland's Rules of Procedure [Rule 2-535(B)] and Maryland case law regarding revisory powers over prior Orders.

SUMMARY OF KEY POINTS

The zoning law at the heart of this controversy is the "definitional" and "grandfathering" provisions of Bill 98-75 and subsequent Bill 139-83 that was passed for the purpose of ratifying and approving those Use Permits issued under the authority of Bill 98-75. Specifically, these acts amended the B.C.Z.R. to establish four (4) new zoning classifications intending to insure the preservation of Baltimore County's Natural Resources and allowing shellfishing businesses to operate in R.C.5 Zones only by special exception. The Council permitted those fishermen presently in operation (on or about 1975) to file for Use Permits to "grandfather" their businesses, thereby negating the necessity of seeking special exceptions for continuation. It added the following new definitions:

“Commercial fishing, crabbing and shellfishing operation.

Primary - A residential or commercial property fully devoted to commercial fishing activities and the retail and wholesale sale of fish, crabs and shellfish including facilities for the repair, storage, launching, berthing, securing, loading and unloading of catches and gear including nets, crab pots, oyster tongs; trout lines and clamming equipment, also live boxes and the necessary cold storage facilities.

Secondary - A residential property which is the domicile of a person engaged full or part time as a commercial fisherman and who is required under Title 4 of the Department of Natural Resources to possess a license for the purpose of catching by net, line, trap or tongs, of fish, crabs or shellfish and has limited facilities for the storage and berthing of a commercial fishing boat and the loading or unloading of catches and gear.”

New Sections 1A00 through 1A04 were added to the Resource – Conservation Zones. Section 1A04 – R.C.5 (Rural – Residential) zone enumerated uses permitted by right or by special exception. Applicable here is B.C.Z.R. 1A04.2.B.7 – that states:

“Commercial fishing, crabbing or shellfishing operation – *Primary* or *Secondary*, except that any such use existing at the time of date of enactment of this subsection may continue at the same level of intensity provided that within 365 days of the enactment date of this legislation, they shall file for a Use Permit as prescribed under Section 500.4 of the Zoning Regulations.”

Each fisherman was required to submit a site plan to the Zoning Commissioner within this timeframe so that the Zoning Commissioner could approve the continued operation of each shellfishing business in existence at the time the legislation was enacted. Each fisherman would be bound by the site plan as to the extent of his business and would be limited to the “same level of intensity” forevermore. Of course, nothing would prevent any fisherman so protected from requesting a special exception in order to expand their business operations. *See* Case No. 84-

147-XSPHA involving James R. Myrick and his attempt to expand his shellfishing business at 1326 Goose Neck Road.⁴

The waterfront property under consideration has 27,500 square feet in lot area (110' wide at Island View Road with 140' of frontage on Browns Creek). The property did not meet the minimum lot area requirements after Bill 98-75 enacted new Section 1A04.3 but had been a lot of record as shown on the Amended Plat of Barrison Point, recorded in the Land Records of Baltimore County in Plat Record W.P.C. No. 8, Folio 82. The property is improved with a one-story single-family dwelling built in 1924, detached garage, bulkhead and pier. The Becks, following their marriage, purchased the home in 1940 and resided there until their deaths. It was the current owners' (Mattes), who after acquiring the property in 2009 from Dan Beck, Jr., put in place a macadam driveway, floating pier and began the resurgence of the property as a commercial fishing and shellfishing facility that sparked complaints and led to this litigation. Petitioners focused their effort at attacking the validity of the Use Permit and establishing a nonconforming use history by asserting that no fishing or shellfishing took place at this location for many years (between 1979 – from the death of D. Franklin Beck to 2009 when Andrew Mattes purchased the property) and that this surely diluted and brought to an end the conditional Use Permit granted in 1978.

Moreover, they assert the requirements of Bill 98-75 were never met as Daniel Beck, Jr., the named applicant for the Use Permit, submitted his application late and didn't reside or have his domicile on the subject property. They also presented evidence that neither he (Beck) nor his father possessed the requisite commercial DNR tidal fishing license set forth in the definition of a *secondary* shellfishing operation.

⁴ Mr. Myrick is identified as CFC No. 13 on the Use Permit records of Baltimore County submitted by Petitioners (Tab 17) indicating that Mr. Myrick was the 13th applicant out of 30 others who submitted applications.

HEARING TESTIMONY

The arguments of the parties are fully addressed in their respective written memorandums and will not be repeated here in length. Mrs. Guckert, the immediate neighbor of 2534 Island View, testified that her family moved to 2530 Island View in 1926 and she has lived there for over 83 years. She has been active in community organizations for some 50 years having served on both the Barrison Point Improvement Association and Back River Neck Community Association. Since living there, she stated that there has never been a licensed crabbing and fishing facility in her neighborhood. She acknowledged that D. Franklin Beck, Sr. did perform fishing and crabbing until 1979 but that he never had a commercial license. He used trout lines but never crab pots. The Becks' son, Dan Beck, Jr., moved to 294-C Schaffers Road, across Browns Creek in 1970 and never again resided on Island View Road. She was close to Mae Beck and after her husband's death would often help write checks for her to sign and was in and out of her home on a weekly basis for 28 years. Mrs. Guckert described those years as peaceful but that ended when the Mattes moved in and started to bring in loads of crab pots and began crabbing and fishing operations not far from her bedroom. The Mattes soft crab business requires pumps to run continuously and daily crabbing operations get started at 4:00 A.M. She provided a statement and a detailed account of her concerns and photographs. *See* Petitioners' Exhibit 1 (Tab 3). In her opinion, Mattes has intensified the use of the site and should lose the permit altogether. She says the commercial operation has made the area an obvious eyesore.

Mr. Donovan picked up the story from 1992 when he and James Brown purchased their properties. He testified that the shellfishing facility will cause serious disruption to the area because the already bad traffic conditions would be aggravated. There is only limited access onto the peninsula and the road is so narrow it often requires one driver to pull off the road so

another car or truck can squeeze by. The increased traffic due to a commercial fishing operation would constitute a nuisance and public hazard. He contends that the inactivity – no fishing or shellfishing at the subject property for 30 years – has effectively terminated the Use Permit and likewise the non-conforming use has been lost.⁵ Thus, the Mattes' have no vested right to operate a crab fishery.

On behalf of Mr. and Mrs. Mattes, Mr. Schmidt presented the application for the Use Permit, site plan, and signed Order as Respondents' Exhibit 1, and they are self-explanatory. The Zoning Commissioner approved a Use Permit that allowed 12,600 square feet to be utilized for fishing and crabbing, excluding slough boxes which protrude into Browns Creek. As shown on the site plan, this represents 50% of the entire lot used for commercial enterprise. Mr. Mattes testified that he is only using 2,300 square feet of the property and he owns and stores 600-700 crab pots in the areas designated on the plan. Messrs. Freund and Kelly, Zoning Enforcement Inspectors, testified that as a result of multiple complaints received from neighbors they inspected the property on 2/19/09, 5/21/09, 10/14/09, and 3/10/10 and each time found it to be in compliance with the Use Permit and regulations.

Next, Dan Beck testified that both he and his father possessed commercial fishing licenses issued by the DNR in the 1970's. He stated he obtained his license at age 14 (License Number 878) and has held the Office of President of the Baltimore County Waterman's Association. His father had always been a fisherman and crabber. He described how he and his father operated the business often employing additional people to help. They would fabricate and manufacture pots for their own use, store not only crab pots on the property, but also eel

⁵ As stated earlier, Petitioners believe the Use Permit issued in this matter to be a red herring to begin with, the requirements of Bill 98-75 were not met as Daniel Beck, the named applicant, did not reside on the property nor did he or his father have the required commercial fishing license (Petitioners' Exhibit 1 [Tab 19] – letter from DNR).

traps, pound nets, gill nets, anchors, floats and other materials necessary to carry on the shellfishing business. In 1979, his father phased out the heavy work required to haul in nets and crab pots but continued with minnow catching, eel traps and the use of slough boxes. Darren Hallock, Gene Williams and Joe Rohling testified and corroborated Beck's testimony. Hallock worked for Beck in 1985 through 1987 and often at Island View Road. Williams, familiar with the elder Beck's property since 1968, described the commercial operation and use of the holding boxes kept at Island View Road that offered deep water. Rohling worked for Beck and described the storage of equipment often brought to Island View Road. There is no doubt from this testimony that the Use Permit had been utilized.

APPLICATION OF LAW TO FACTS; REASONABLE INFERENCES

Bill No. 98-75 recognized the then existing shellfishing businesses by exempting them from extinction. D. Franklin Beck, Sr., and his son, Daniel F. Beck, Jr., were benefactors of this legislation. The site plans submitted to gain such exemption limited both the use and its location on a property. The shellfishing operation was not approved as a non-conforming use. It was approved as a Use Permit pursuant to B.C.Z.R. Section 500.4. That section provides that a land use may be validated in certain circumstances by the application for and receipt of a Use Permit. Rather than leaving existing shellfishing operations to be determined under the non-conforming use law regulated in B.C.Z.R. Section 104, Bill No. 98-75 established the Use Permit process. It is clear that the approval granted was exercised – as the shellfishing operation existed when Mr. Beck's parents lived on the property and continued until D. Franklin Beck, Sr.'s death in 1979. Neither the State nor County has changed the applicable regulations in the interim nor have any judicial decisions "defined the duration" of the Use Permit. The testimony of Mrs. Guckert provides substantiation that the "property interest" in the Use Permit became diluted after the

many years of nonuse; however, it is equally persuasive that the County has not sought to rescind or renegotiate the Use Permit, and thus it remains valid. Maryland case law supports the distinction between the Use Permit granted in 1978 and a special exception use which must be utilized under B.C.Z.R. Section 502.3. *See, Marek v. County Board of Appeals*, 218 Md. 351 (1958).

While any alleged defect regarding the validity of the Use Permit issued by Zoning Commissioner DiNenna, it was surely cured by the subsequent action taken by the County Council when it enacted Bill 139-83,⁶ I would, however, be remiss in not commenting on this in view of the lengthy testimony presented at this hearing regarding Daniel Beck Jr.'s alleged fraud, mistake or irregularity in obtaining it. Petitioners' Exhibit 1 (Tabs 15 and 16) show Dan Beck, Jr. filed two applications for Use Permits, one for 294-C Schaffers Road where he resided, and a separate application for 466 Barrison Road – now 2534 Island View Road. It is this second application signed by his parents, Franklin and Mae Beck – the legal owners that is relevant here. Dan Beck signed as “lessee”. Neither the application(s), attorney Robert J. Romadka's cover letter, the site plan or County's inspection report makes mention or an indication as to whether Beck applied for a *primary* or *secondary* “Commercial fishing, crabbing and shellfishing operation” as defined above. It is important to note that a *primary* fishing operation does not require the residential property to be the *domicile* of the applicant. The documents filed indicate only that the Use Permit applied for was pursuant to Bill 98-75 and B.C.Z.R. Section 500.4. The County performed an inspection of the property, took photographs and recommended approval of a commercial fishing, crabbing and shellfishing Use Permit to the Zoning Commissioner. It

⁶ In October 1983, the Bill was enacted and states in pertinent part, “that all actions taken by the Zoning Commissioner or Deputy Zoning Commissioner in issuing or approving said use permits under the authority, or purported authority, of Council Bill 98-75, are hereby ratified, reinstated and approved.”

was the Zoning Commissioner (for reasons we will now never know) who placed in his Order the words “that the herein described property should be and the same is hereby approved as a *secondary* Commercial fishing, crabbing and shellfishing operation”. The case law that interprets the revisory power of a court or administrative agency found in Maryland Rule 2-535(b) requires a clear finding of fraud, mistake or irregularity in order to grant Petitioners’ request that I reverse or revise late Commissioner DiNenna’s Order. *See, Suburban Properties Management, Inc., v. Johnson* 236 Md. 455 (1964); *Home Indemnity v. Killian* 94 Md. App. 205 (1992); *Sheila F. Thacker v. Edwin F. Hale* 146 Md. App. 203 (2002). It can be of no comfort to the Petitioners that my search of the record and facts presented fails to disclose any clear evidence of a mistake or irregularity.

CONCLUSION

For all these reasons and based on the evidence presented, an examination of the words contained in the regulations and definitions provided and the language, purpose and legislative history, I find that Respondent is entitled to conduct a commercial fishing, crabbing or shellfishing operation as allowed under the October 9, 1978 Use Permit. The legislation (and permit) also mandated that any such use existing on the date of enactment of the law could continue only *at the same level of intensity*. Any attempt to expand the use as defined by the site plan would require a special exception and would not be allowed by amending the site plan. Although the legislation did not define the ordinance’s duration, I find the County Council expressly intended a vested use permit to be a “property interest” and last forever. This finding is evidenced by the fact that in June, 1978, the Council passed Bill No. 30-78, effective June 22, 1978, which repealed Bill No. 98-75 and, in effect, deleted any reference to use permits and provided that fishing and shellfishing facilities in R.C.2, 3 and 5 Zones be allowed only by

special exception. In the interim period, between 1976 and the passage of Bill No. 98-75, use permits were submitted for approval to the Zoning Commissioner and were subsequently approved after Bill Nos. 98-75 and 30-78 went into effect. Approval, however, was contingent upon a site plan being submitted and total compliance being attained by the user. Because of the confusion rendered by the late approvals, the Council passed Bill No. 139-83 validating the continuation of such shellfishing activities by those who submitted site plans in 1977 and which were approved in 1978. This legislation recognized the importance of those site plans by reemphasizing the language of Bill No. 98-75, to wit, limiting the continued use to that which existed at the time the use permit was approved. On this record, the facts and law led to an inescapable conclusion that the Use Permit was properly granted in 1978, ratified in 1983 and continues with validity today.

Pursuant to the advertisement, posting of the property and public hearing on this Petition held, the relief requested shall be denied.

THEREFORE, IT IS ORDERED, by the Zoning Commissioner for Baltimore County this 19th day of April 2010, that the Petition for Special Hearing to invalidate a fishing and shellfishing facility at 2534 Island View Road for non-conforming use or otherwise, be and is hereby DENIED.

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

WILLIAM J. WISEMAN, III

Zoning Commissioner

for Baltimore County

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