

IN RE: <b>PETITION FOR SPECIAL HEARING</b>	*	BEFORE THE
NW side of Island View Road, 208' NW		
c/l of Barrison Point Road	*	OFFICE OF
<b>(2534 Island View Road)</b>		
15 <sup>th</sup> Election District	*	ADMINISTRATIVE HEARINGS
6 <sup>th</sup> Council District		
	*	BALTIMORE COUNTY
Andrew J. Mattes, III, et ux,		
<i>Owners/Respondents</i>	*	
Theresa J. Guckert, et al		
<i>Petitioners</i>	*	<b>CASE NO. 2011-0051-SPH</b>

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**OPINION AND REMAND ORDER**

This matter comes before the Office of Administrative Hearings for Baltimore County for consideration on Remand concerning an ongoing Petition for Special Hearing filed by Theresa Guckert, David Donovan and James Brown (Petitioners). The Board of Appeals (BOA) in its Order, dated August 2, 2011, found that an interlocutory appeal from the Zoning Commissioner of an Order Denying a Motion to Dismiss based on the principles of *res judicata* was not reviewable by the BOA until the completion of the entire case before the Zoning Commissioner. The BOA Remanded this matter to the Office of Administrative Hearings for further adjudication on the merits.

Appearing at the public hearing for this case were Theresa J. Guckert, David Donovan and James Brown, Petitioners, represented by Douglas N. Silber, Esquire. Also appearing in support of the Petitioners were Ernest Hoffman and Gregory Kirkpatrick. Respondents Andrew J. and Stephanie Mattes appeared, represented by Lawrence Schmidt, Esquire with Smith, Gildea & Schmidt, LLC. There were also a number of persons present in support of the position of the Respondents. These individuals are too numerous to mention and specifically identify herein. However, all have signed in on the Respondents' Sign-In Sheets. Reference is made to the sign-in

sheets which are contained within the file.

### PROCEDURAL HISTORY

The history of this matter is considerable. Petitioners filed a Petition for Special Hearing under Case No. 2010-0220-SPH, requesting the Zoning Commissioner “to invalidate a fishing and shell fishing facility at 2534 Island View Road for non-conforming or otherwise.” After a full hearing, Commissioner Wiseman, by his Memorandum and Order dated April 19, 2010, denied the Petition and confirmed therein the validity of the existing use permit for the property issued in 1978. Petitioners timely filed a Motion for partial Reconsideration, seeking a finding that the fishing, shell fishing and crabbing operation at the subject site was operating at an intensity that was above that which was permitted in the 1978 use permit. That Motion was denied by Commissioner Wiseman per his ruling dated June 1, 2010. In the body of his ruling, he “instructed” Petitioners that he believed they could raise the issue “intensification” by way a new and separate Petition for Special Hearing. Petitioners did not file an appeal to Commissioner Wiseman’s ruling of April 19, 2010, nor his denial of the subsequent Motion for partial Reconsideration. Petitioners then filed the instant matter, asking the then Zoning Commissioner to determine whether the scope and intensification of the fishing, shell fishing and crabbing business permitted by the use permit had been exceeded. Respondents then filed a Motion to Dismiss the new Petition for Special Hearing, arguing that the new Petition was barred by *res judicata*. A hearing was held and per his Order of December 20, 2010, Commissioner Wiseman denied the Motion, and further found that his ruling constituted a “final Order,” thereby making it amenable to the filing of an immediate appeal to the Baltimore County Board of Appeals (Board). The Board heard argument on the validity of the Motion to Dismiss and issued an Opinion and Remand Order dated August 2, 2011, finding that the appeal of the denial of the Motion to

Dismiss was premature until the case was fully completed and all testimony heard, returning the case to the Office of Administrative Hearings for adjudication of the “intensification” issue on its merits.<sup>1</sup>

### THE INSTANT MATTER

Thus, this case returned to the Office of Administrative Hearings and was heard by this writer on November 8, 2011. At the outset, Counsel for the Respondents moved once again for dismissal of the Petitioners’ Special Hearing Request, on the grounds that it was barred by *res judicata*. The Motion was held sub curia at that time pending completion of the proceedings.

### MOTION TO DISMISS

Respondents’ Counsel has taken the position that I may rule on the Motion to Dismiss made before me on November 8, 2011, irrespective of it being the same Motion made in this matter previously before Commissioner Wiseman. As the old expression goes: “There’s good news and bad news” for the Respondent. I am persuaded by the holdings in *Ross v. Ross* 90 Md. App. 176 (1992) and *Driver vs. Parke-Davis and Company* 29 Md. App. 354 (1975) that I may in fact exercise my own judgment on the Motion in spite of the ruling made earlier by Commissioner Wiseman. Counsel also looks for support of his Motion to *Whittle vs. Board of Zoning Appeals* 211 Md. 36, 128 A 2 41 (1956) in which the Court of Appeals, in discussing the *res judicata* doctrine held that the rule applied not only to bar that which was presented in an earlier case from being re-litigated in a subsequent matter, but also extended it to all matters which could have been litigated. (emphasis added) id at 49 125 A 2 41.

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<sup>1</sup> The Office of Administrative Hearings of Baltimore County replaced and absorbed the hearing responsibilities of the Office of the Zoning Commissioner of Baltimore County by act of the County Council effective January 16, 2011.

In the instant matter, the previous Special Hearing Petition (2010-0220-SPH) requested that a finding be made by Commissioner Wiseman that he “invalidate the fishing and shell fishing facility for non-conforming use or otherwise.” However, while Baltimore County Council Bill 139-83, Section 3, specifically did not authorize intensification of the activities permitted by the Bill; it did allow intensification of those activities if authorized by special exception. The Bill further states that intensification absent an authorizing special exception order subjected the applicant “to all applicable penalties, including a civil penalty.” It does not call specifically for the termination of activities legally permitted by the otherwise valid underlying use permit. Any penalty is apparently directed at the intensified activities only, and as such could include removal of the improperly intensified activities and/or a civil fine for any such violation of the use permit parameters. Thus, Petitioners’ previous request for invalidation of the use permit itself would not be affected one way or the other by a finding as to intensification. As such, I believe Whittle is not here applicable.

In addition, although Commissioner Wiseman notes on page 6 of his Memorandum and Order dated April 19, 2010, that Petitioner Guckert offered her opinion that Respondent Mattes had intensified the use of the site, the recording system used by the Zoning Commissioner at the time (since replaced) failed to operate; hence, I therefore am not, in any event, able to ascertain for certain what was or wasn’t said regarding intensification of use by the Petitioners’ witnesses. For all of the above, therefore, I shall deny the motion.

#### TESTIMONY AND MERITS

Although proving intensification will not support Petitioners’ request for the invalidation of the underlying use permit, if intensification is established by the Petitioners, Respondents would still be subject to the termination of identified intensified activities as well as the removal

of any materials, equipment or machinery in place to carry out those activities.

Therefore, I will now move to a review of the testimony and a determination as to whether or not intensification of the activities permitted in the underlying use permit have, in fact, occurred. Counsel for Respondents had proffered, and it is not controverted by any of the parties, that the subject property covers 6 acres, or approximately 25,000 square feet. It is zoned RC 5 and is improved by a single family dwelling which is the residence of the Respondent and his family, and is also the site of an accessory shed and garage.

Gregory Kirkpatrick, an Anne Arundel County Police Deputy, testified that he had previously served as a Corporal with the Maryland National Resources Police from 1973 to 2002. He patrolled the Middle River area in 1976 by boat and on a number of occasions passed by and could see the subject site. He recalled a pier, but doesn't remember the number of boats docked there. He recalls the presence of crab pots, but was unsure as to the number kept on the property. On cross-examination he acknowledged that he remembered few details from that time, including the number and uses of crab pots on the subject property. He was certain however that he had never issued any citations for violations on the site.

Ernest Hoffman, the owner of property approximately eight lots away from the subject site (400 feet) since 1956, was called as a witness and testified that he did not definitively know or remember what was used in the water in 1978 from the subject property, but does recall some crab pots in use. He also doesn't recall, one way or the other, seeing the storage of crab pots on the property. He states that after the Respondents purchased the property, more crab pots were in evidence and were being used more extensively than before the Respondents' purchase. He has also seen boats at the dock at times, but doesn't know who owns them. It is his opinion that the business seems to be growing, as he notes more pots, more activity on the site, more boats, cars

and the storage of crab pots on the site. To his mind “common sense” indicates that the business at the subject site has intensified. On cross-examination, he confirmed that he had never actually been on the property and that he is neither a fisherman nor a crabber.

Theresa Guckert, who has lived next door to Respondents’ property since 1926, was called and testified that over the years she had visited the previous owners of the property on many occasions. She had walked around the property, but had not seen many crab pots in evidence and noted that in the 1970s there was little commercial activity on the site; and she related that the previous owner did very little crabbing. She further stated that after the Respondents bought the property there were more vehicles present and the number and use of crab pots increased significantly. She acknowledged that she is now at home most of the time and has drawn some conclusions from photos shown to her. She provided a chronological listing of vehicle traffic at Respondents’ site (Petitioners’ Exhibit 3), but cannot identify either the type of trucks, their ownership, or their use. She does recall that, after the 2009 hurricane, the Respondents had a number of people on the property carrying out repairs.

Andrew Mattes II was called as a “adverse witness.” He testified that he bought the subject property in 2009. He stated that he was licensed to utilize 300 crab pots, an employee Gil Hardison, had a license for 900 crab pots, Respondents’ wife 300 crab pots, and his father, 600 crab pots. He stated that all the pots are utilized through his business. He described storing 1,500 pots on the property during the winter, and a small number during the summer, when most are in use in the water. He pointed out, that except for repairs, he had no employees who worked on site. He further acknowledged that he has a larger boat and a small one docked at the property. He recalls that his employee’s boat was at the site once or twice and that his father does not keep his boat there either.

Upon questioning by his attorney, Respondent testified that he is a commercial fisherman and crabber. He offered that the legality and legitimacy of the existing use permit have been confirmed and resolved in Commissioner Wiseman's previous Opinion of April 19, 2010; which Order was not appealed. He maintains that everything present on the site and his activities thereon, are all within that Order and authorized under the existing use permit. He went on to note that the permit allows commercial fishing, crabbing and shell fishing operations on 50% of the subject property, or approximately 12,500 square feet. He believes that the storage of crab pots takes up approximately 2,000 square feet, and that, including all business related uses, the total square footage utilized under the permit is perhaps 3,000 square feet in total. The remainder of the property is utilized by him for his home and other non-commercial uses. He has one floating dock and pilings where the old, previous pier was located. He has not yet constructed but plans to build a permanent pier in the future. He further stated that all crab pots are stored in space permitted under the existing use permit and plan. He acknowledged that he and his wife each drive a truck. Finally, he offered that after the hurricane of 2009, storm damage and debris cleanup required the presence of a number of people and equipment on most of the subject property.

Daniel Bock, a crabber and fisherman who lives across the creek from the subject site, was called to testify and to the best of his memory that crab pots were stored two or three high on the subject property in the 1970s. He was unable to quantify the number stored in the year 1978 specifically.

#### FINDINGS

The determination of whether or not there has been intensification of the activities permitted under the subject use permit requires a baseline starting point. The very limited and

extremely anecdotal testimony provided by Petitioners fails to establish a legally or reasonably sufficient starting point from which to determine if the Respondents' use of the subject property has intensified generally, let alone in specifics, over that which was authorized in the 1978 use permit.

Therefore, I believe that the only appropriate methodology to determine if such intensification has in fact occurred, is to compare the testimony of the Respondents as to what exists on site and the activities permitted to be carried on there under the actual use permit itself. The Permit clearly notes the total net area of the subject property as 25,200 net square feet. It states that the Permit allows a "commercial fishing, crabbing and shell fish operation, wholesale and retail sale of crabs and fish...."

It then states:

"The following items will be utilized in the operation and/or will be stored on the premises; storage of nets, crab pots, boats, anchors, walk-in box, live boxes and other miscellaneous equipment used in the operation thereof, berthing of fishing boat, loading and unloading of catches and gear."

The plural is used in the above description with the exception of "walk-in box." It does not apply any specific numbers or limitations as to how many of each of the listed items is permitted to be utilized under the Permit. The Permit does, however, specifically limit the use of those items on the subject site to "approximately 50% of the total net area of the property..." The Respondent testified that only approximately 3,000 square feet of the subject property is used for commercial purposes pursuant to the use permit. Clearly, the Permit on its face imposes no limit as to the number of the authorized items and activities listed and set out in the Permit and accompanying plan as long as those items and activities utilize no more than 50% of the site, or

approximately 12,100 square feet. Petitioners offered no testimony whatsoever to contradict in any meaningful way Respondent's testimony.

The inspection documents presented by the Petitioners (Petitioners' Exhibit 1) merely are a "snap shot" of what was on the property that day in 1978. It offers nothing beyond that. The extent to which a prior owner did or didn't avail himself of that which is permitted by the use permit is not dispositive of the issue of intensification. This is not a matter of what was on the site at any given point, but what is permitted to be on and take place from this property under the use permit which has already been validated previously by Commissioner Wiseman.

Pursuant to the advertisement, posting of the property and public hearing held on this Petition, and for reasons now set forth above, I find that the Respondents have not intensified the use of the property in excess of that which is permitted under the use permit and plan issued October 9, 1978.

THEREFORE, IT IS ORDERED, this 3<sup>rd</sup> day of January, 2012, by this Managing Administrative Law Judge for Baltimore County that the Petition for Special Hearing, be and is hereby DENIED.

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

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Signed  
LAWRENCE M. STAHL  
Managing Administrative Law Judge  
for Baltimore County

LMS:pz