

IN THE MATTER OF	*	BEFORE THE
<u>JAMES DIMICK, JR. and ROBERT G. DIMICK</u>	*	BOARD OF APPEALS
<u>- LEGAL OWNERS/PETITIONERS</u>	*	
FOR SPECIAL EXCEPTION FOR THE	*	OF
Property located on the S/s of Chester Road, 750'	*	BALTIMORE COUNTY
W of c/l Susquehanna Avenue (826 Chester Road)	*	
15 th Election District; 6 th Councilmanic District	*	Case No. 14-123-X

* * * * *

OPINION

This matter comes before the Board on appeal of the decision of the Administrative Law Judge (“ALJ”) in which a Petition for Special Exception was granted with conditions. The Petition for Special Exception sought relief pursuant to §1B01.1.C.8 of the Baltimore County Zoning Regulations (BCZR), for a fishing and shell fishing facility, shoreline, Class II as provided in the BCZR, if the ALJ did not determine that the plan updating the use permit for a commercial fishing, crabbing and shellfish operation dated March 2, 1979 rendered this request moot.

The Board convened for hearings on April 24, 2014 and June 10, 2014. Legal Owners and Petitioners, James Dimick, Jr. and Robert George Dimick (the “Dimick brothers”), were represented by Lawrence E. Schmidt, Esquire. Peter Max Zimmerman appeared on behalf of People’s Counsel of Baltimore County. Protestant and Appellant, Glenn Dowell, was represented by J. Carroll Holzer, Esquire. Memoranda in lieu of closing arguments were submitted to this Board on June 30, 2014. Allen Robertson, attended the hearing and opposed the petition. He did not file an appeal to the Board, however, he did file a post-hearing memorandum. A public deliberation was held on August 19, 2014.

Factual Background

The subject property is waterfront property located at 826 Chester Road on Frog Mortar Creek in the Middle River area of Baltimore County (the “Property”). It is 0.286+/- acres and is zoned DR3.5. The Property was purchased by James Dimick, Sr. and his wife, Helen, in 1958

where they resided with their 2 children, James Jr. and Robert (the “Dimick brothers”). It is rectangular in shape, is approximately 0.286 acres, and is zoned DR 3.5.

In 1979, because they resided at the Property, Mr. and Mrs. Dimick were granted a Class I use permit to operate a “commercial fishing, crabbing and shellfish operation”. (Pet. 3). Since the 1970s, the Dimick brothers, along with their parents, lived and operated their crabbing business out of the Property. After Mr. and Mrs. Dimick passed away, the Dimick brothers continued the operation. While neither of them currently reside at the Property, they wish to continue the business from the Property and are therefore seeking a Class II license.

The requested relief in this case came about as a result of a code enforcement action filed against the Dimick brothers by the former owner of 824 Chester Road, Mark Green, when he was selling his house (“Mr. Green”). (*In the Matter of James Dimick, Robert George Dimick, Civil Citation No. 136762*). Mr. Green has since sold 824 Chester Road to Thomas Jenkins.

Evidence

James Dimick, Jr., 1117 Susquehanna Avenue, testified that he is a commercial waterman and that he lived his parents and brother, Robert, at the Property. Together, the Dimick family operated a crabbing business. James, Jr. testified that he and Robert, each have their own set of customers who purchase crabs. The Dimick brothers both store the crab pots used between the house and the water. Located on their pier are sluffing tanks as well as an area where the crab pots are power washed and spray painted red. (Pet. 1A – 1L).

An aerial photograph revealed that all of the structures on the Property have remained the same for the past 25 years. (Pet. Ex. 2). The Dimick brothers are not requesting to improve or enlarge any structures on the Property. In addition to the house, there is an 8’ by 14’ refrigerator/freezer and a shed containing a pressure washing machine, a lawn mower and yard

equipment. The freezer and shed are located on the Property near Chester Road. Fuel tanks are stored on the west side of the Property,

James Dimick explained that the crabbing season opens April 1 and closes December 15 each year. The crabbing business is regulated by the Maryland Department of Natural Resources (“DNR”) which state agency is charged with issuing crabbing licenses. The Dimick brothers do not catch fish or oysters. Since the late 1970s, the daily schedule has not changed and typically runs for 9 hours beginning an hour before sunrise in order to prepare the bait needed for the day. Because the crabbing business depends upon seasonal changes and weather related events, crab harvesting does not operate on a 9:00-5:00 schedule. DNR does restrict crabbing to 6 days per week.

Each of them return to the Property around 2:30 each day to load the crabs onto trucks or to store them in their refrigerator/freezer. Neither of the Dimick brothers sells the crabs retail from the Property. Each of them sells the crabs to wholesalers, crab houses or restaurants. The remainder of the work day involves checking the soft shell crabs and maintaining the boats. The work day usually ends by 7:00 p.m.

James Dimick employs 2 workers who crab with him. Robert Dimick also has 2 workers. Some or all of the 6 people park their vehicles on the Property during the work day. There are 2 boats docked at the Property, one 40’ and one 35’ fiberglass boat bought by each of them in or around 1990. Each of the Dimick brothers have a crabbing license. In addition, a license was granted to James Jr.’s wife and to Robert Dimick’s son. (Pet. Ex. 4A-4D). In total, these 4 licenses allow them to use 2400 crab pots. (Pet. Ex. 4). A “good catch” is 4 to 5 bushels a day.

Other activity at the Property includes delivery by a bait truck which unloads bait into the freezer 2 times per week. In addition, a fuel truck delivers diesel fuel for the boats 3 times per

week. There are no signs on the Property to identify that any business operates there. The power washing and painting of crab pots takes place on the pier. There are no flood lights on the Property.

During the off-season, James Dimick testified that 1200 crab pots are stored on the Property between the house and the water which includes the pots that Robert uses. Each pot is 20 inches tall. The pots, which are painted red, have been stacked 4-5 pots high. (Pet. Ex. 1C, 1D, 1I). Given the size and amount of crab pots, this is the source of contention for the Protestant neighbors. A drawing of the initial crabbing operation which was filed with the use permit application in 1978 which was drawn by James Dimick, Jr. represented to the County that the crab pots would be stored in a 4' x 33' area on the west side of the house. (Pet. Ex. 3). On cross examination, James Dimick acknowledged that the use permit limited the crabbing operation to 25% of the Property.

Also testifying on the Dimicks' behalf was Bernadette Moskunas, Vice President and owner of Site Rite Surveying, who was accepted as an expert in Baltimore County zoning issues. While Ms. Moskunas is neither an engineer nor surveyor, her office prepared the site plan for the proposed crabbing operation and her brother Michael Moskunas, a registered surveyor, sealed the plan. She testified that the proposed crabbing operation meets all of the Special Exception factors set forth in BCZR 502.1 and highlighted that this business has been operating for 35 years without issue or interruption. On cross examination, Ms. Moskunas admitted that the Class II license would permit the Dimick brothers to use the entire Property in the business, rather than 25%.

John Slough, 832 Chester Road, also testified on behalf of the Dimick brothers. A 69 year old resident, he has lived at that house his entire life. Between 1992 -2000, Mr. Slough was similarly licensed to operate a crabbing business out of his house. Mr. Slough has known the Dimick family for over 30 years. He testified that the crab pots are stored on the Property in the off-season. He also said he does not have any objection to the continued operation of the Dimick

business. It was his opinion that the crab pots storage on the Property was not unsightly but rather “part of the heritage” of the waterfront activity.

Testifying in opposition to the requested relief was Chip Raynor, a Code Enforcement Inspector with Baltimore County. While he was not testifying on behalf of the County, he was requested to visit the Property by the Protestant, Glenn Dowell. In his employment with Baltimore County, Mr. Raynor was previously assigned to crabbing operations in the Middle River area.

Mr. Raynor visited the Property on April 12, 2014 and took photographs of the stored crab pots. (PC. Ex. 7A-7C). The photographs revealed red crab pots stored 4 high and the entire 50’ width of the property, consuming more than ½ of the front yard (water side). He also observed a non-commercial boat on a trailer as well as 2 jet skis. In his opinion, this operation was too large for the Property as compared to other crabbing operations he has seen in the area. On cross examination, he admitted that there was no height restriction on the storage of crab pots.

Glenn Dowell, 828 Chester Road, the Protestant, has lived next to the Property since 1987. When he purchased his home, the Dimick crabbing business was in operation. However, he testified that the business was much smaller and crab pots and other business activities were much less. He recalls that the Dimick brothers did power washing and painting of the crab pots in 1987. He was very friendly with the Mr. and Mrs. James Dimick and had no objection at the time to the crabbing operation.

He made clear that the Dimick house has been vacant for the past 12 -15 years and the number of crab pots stored on the property in the off-season has grown to the extent that he is being deprived of the use and enjoyment of his house and water view. He added that his view to the left of his property is not obstructed.

Mr. Dowell also complained about the noise and use of the pressure washing machine all day during crabbing season. He objects to painting the pots and allowing the paint to drip into the

bay which causes contaminants to pollute the water. He does not like the manner of, and times for, delivery of fuel to the Property, noting that fuel is delivered 2-4 times per week by a tanker that runs a hose to the fuel tanks by the pier. Finally, he objects to the number of vehicles coming to the Property including the bait truck which delivers in the afternoon and evening.

On cross examination, Mr. Dowell acknowledged that when he purchased his property, Mr. Slough was also operating a crabbing business and these businesses were on either side of his house. He further admitted that crab pots have been stored in the Dimick front (waterside) yard since 1987 and that fuel and bait trucks have made deliveries to the Property since that time. He has never filed a complaint with the County nor did he ever ask the Dimick brothers to move the pots.

There is a row of 4 to 5 trees on the right hand water side between the 2 properties which also blocks his view of the water. Erecting a fence would defeat the purpose of the having waterfront property. Mr. Dowell would agree to have the pots stored in the back yard (street side). He also would consent to power washing so long as that activity occurred after 8:00 a.m and before 6:00 p.m.

Thomas Lehner, 1004 Susquehanna Avenue has lived in his home for 22 years. His home is located on the waterfront and to the east of Mr. Dowell's property. He testified that he has observed red color in the water after the Dimick brothers paint their crab pots which, he believes, is polluting the water. Since he has lived there he has observed an increase in the number of crab pots being stored on the Property.

Given that the Property is located in a residential area, Mr. Lehner also indicated that he objects to the power washing which he testified occurs during the evenings and weekends. He described the vacant house as "uninhabitable" and "deteriorating." He pointed out that the house has mold growth and rodent infestation.

On cross examination, Mr. Lehner admitted that he does not have any photographs of the red paint in the water. He also acknowledged that he has never filed a complaint with the County.

Alan Robertson, 1608 Holly Tree Road, Essex, MD 21220 also testified against the requested relief for the same reasons provided by Mr. Dowell and Mr. Lehner, only adding what he believed were violations of applicable laws and regulations involving development of waterfront property.

Decision

The Dimick brothers are requesting relief for a special exception under BCZR 1B01.1C.8 to approve the use of the Property for a Class II Fishing and Shell fishing Facility, Shoreline. The term is defined in BCZR 101.1 as follows:

FISHING AND SHELLFISHING FACILITY, SHORELINE

A principal use that consists of the buildings, equipment or other facilities necessary to accommodate the onshore activities of a fishing and shell fishing business (including retailing or wholesaling of the catches) and that is situated on a lot on the shoreline of tidal waters.

FISHING AND SHELLFISHING FACILITY, SHORELINE, CLASS I

A shoreline fishing and shell fishing facility that can accommodate a fishing business no larger than that entailing the use of not more than two commercial fishing boats and that is situated on a lot also occupied by the primary residence of its operator, who is a person required to have a license by any of the provisions of Title 4 of the Natural Resources Article of the Annotated Code of Maryland. For the purposes of these regulations, a "commercial fishing boat" does not include a boat more than 45 feet long.

FISHING AND SHELLFISHING FACILITY, SHORELINE, CLASS II

A shoreline fishing and shell fishing facility other than a Class I shoreline fishing facility.

The special exception test is codified in BCZR, 502.1 which reads as follows:

§502.1 Conditions determining granting of special exception.

Before any special exception may be granted, it must appear that the use for which the special exception is requested will not:

- A. Be detrimental to the health, safety or general welfare of the locality involved;
- B. Tend to create congestion in roads, streets or alleys therein;
- C. Create a potential hazard from fire, panic or other danger;
- D. Tend to overcrowd land and cause undue concentration of population;
- E. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;
- F. Interfere with adequate light and air;
- G. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these Zoning Regulations;
- H. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations; nor
- I. Be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2, R.C.4, R.C.5 or R.C.7 Zone.

The Court of Appeals in *People's Counsel for Baltimore County v. Loyola*, 406 Md. 54, 62 (2008) affirmed the holding in *Schultz v. Pritts*, 291 Md. 1, 22-23 (1981) in analyzing each of the 502.1 factors in a special exception case and stated

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

The Court in *Loyola* explained that the adverse effects are inherent in all conditional or special exception uses. As applied here, a fishing and shell fishing facility is presumed proper as a special exception use unless the Protestants can show that the use produces effects that are more adverse at this Property than at other locations within the DR 3.5 zone. Thus, the adverse effects inherent in a crabbing operation include: storage of pots; number of people coming and going at the Property; noise; fuel or bait deliveries; power washing, repairing, painting of crab pots and/or smell.

The complaints by Mr. Dowell, Robertson and Lehner were exactly the adverse effects inherent with such a facility. The County Council already determined, when the list of special exception uses was enacted in BCZR 1B01.1C.8, that these type of facilities, with their inherent adverse effects, can exist alongside residences. When Mr. Dowell purchased his home, he did so with full knowledge that the Dimick brothers' crabbing business operated on the west side of his property and that the Slough crabbing business operated on the east side of his property. Similarly, Mr. Lehner testified that the Dimick crabbing operation has existed since he has lived there. Because of this, the Board is mindful that the requested relief is not for a new crabbing business to be inserted into a residential neighborhood where one did not previously exist.

The uncontradicted expert opinion in this case was that each of the 9 special exception factors was met and that there would be no detriment to the health, safety or welfare of the locality. There was no evidence presented to rebut the presumption that the inherent effects of this use are greater at this Property at other properties within the DR 3.5 zone. A site plan was provided showing the operation as proposed. There are no improvements or variances requested to continue the crabbing business.

The testimony was that the Dimick family holds a Class I permit which was granted in 1979. The requested relief for a Class II permit does not require that the Dimicks reside at the

Property nor is there a restriction on the amount of property that can be used in the business. If the Class II permit is denied, the Dimick brothers indicated that one of them would reside in the home so that they can continue their life-long occupations under the Class I permit.

At the same time, when Mr. Dowell purchased his property in 1987, he testified that the Dimick business was a smaller operation and therefore was not offensive. Mr. Dowell admitted that the same type of activities were taking place but the business was less intense. In particular, 2400 crab pots were not stored on the waterfront and were not stacked 4 to 5 pots high. There was little dispute that the Dimick operation has expanded beyond the 25% restriction initially granted with the Class I approval.

The photographs and testimony were compelling that the business consumes the entire property (which it would be entitled to do if it had Class II approval). But, the storage and stacking of red crab pots one on top of the other on the water's edge is unsightly and will continue to cause problems for the locality. In addition, some aspects of the business could be curtailed so as to ensure that property owners can peacefully co-exist along the waterfront. The Board found encouraging and refreshing Mr. Dowell's comments that if conditions were imposed on the Dimick crabbing business that the Dimick brothers would comply, describing them as "honest and not spiteful."

Accordingly, based on the evidence presented, the Board finds that a Class II fishing/shell fishing facility is appropriate at the Property. However, the Board deems it necessary pursuant to BCZR 502.2, to impose the following conditions on this use, at this location:

1. The Dimick brothers crabbing operation shall be permitted to operate during crabbing season ("crabbing season") from sunrise to sunset from April 1 – December 15 each year as directed by the DNR.

2. During crabbing season, the Dimick brothers shall be permitted to store crab pots up to 25% of the Property without restriction on the location within the Property but such pots may not be stacked more than 2 pots in height.

3. During off-season (December 16 – March 31), the Dimick brothers shall store all crab pots off the Property.

4. The cleaning, repair, power washing and painting of crab pots shall occur between the hours of 9:00-5:00 only, Monday through Friday.

5. No signage shall be posted on the Property.

6. The Dimick brothers shall be permitted to keep at the Property no more than two (2) commercial fishing boats (with a maximum length of 45 feet each) at any time. This limitation does not apply to jet skis or other non-commercial watercraft.

7. There shall be no retail sales of any crab/fish from the Property.

8. All fuel and bait deliveries shall be between the hours of 9:00 – 5:00 only, Monday – Friday.

ORDER

THEREFORE, IT IS THIS 30th day of April, 2015 by the Board of Appeals of Baltimore County

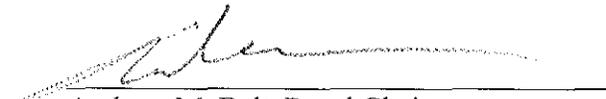
ORDERED that the Petition for Special Exception to allow the use of the subject property for a fishing and shell fishing facility, shoreline, Class II as provided in §1B01.1.C.8 of the Baltimore County Zoning Regulations, be and the same is hereby **GRANTED with the following conditions:**

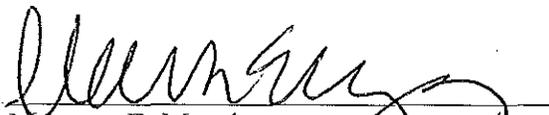
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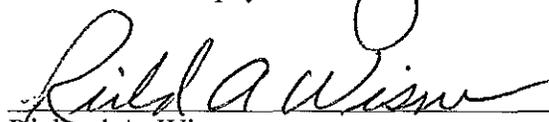
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5. No signage shall be posted on the Property.
6. The Dimick brothers shall be permitted to keep at the Property no more than two (2) commercial fishing boats (with a maximum length of 45 feet each) at any time. This limitation does not apply to jet skis or other non-commercial watercraft.
7. There shall be no retail sales of any crab/fish from the Property.
8. All fuel and bait deliveries shall be between the hours of 9:00 – 5:00 only, Monday – Friday.

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**


Andrew M. Belt, Panel Chair


Maureen E. Murphy


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Board of Appeals of Baltimore County

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April 30, 2015

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RE: *In the Matter of: James Dimick, Jr. and Robert G. Dimick – Legal Owners*
Case No.: 14-123-X

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: James Dimick, Jr.
Robert G. Dimick
Bernadette Moskunus/SiteRite, Inc.
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Chip Raynor/PAI
Arnold Jablon, Director/PAI
Nancy C. West, Assistant County Attorney/Office of Law
Michael E. Field, County Attorney/Office of Law

Glenn Dowell
Allen Robertson
Tom Jenkins
Thomas Lehner
John Slough