

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
NW/S Island View Road, 208' NW c/line 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>Owners/Respondents</i>	*	
Theresa J. Guckert, et al	*	Case No. 2011-0051-SPH
<i>Petitioners</i>		

* * * * *

RULING ON MOTION TO DISMISS

This matter comes before the Zoning Commissioner on a Motion to Dismiss the Petition filed by Sebastian A. Cross of Gildea & Schmidt, LLC on behalf of Legal Owners/Respondents, Andrew J. Mattes, III and Stephanie L. Mattes, his wife.¹ The Office of People’s Counsel and the Petitioners, Theresa Guckert, David Donovan and James Brown, filed an Opposition to the Motion, and the parties appeared before the Zoning Commissioner for a motions hearing on November 18, 2010. As will be explained in greater detail, I find that the instant petition is not barred by *res judicata* and the Motion to Dismiss will therefore be denied.

BACKGROUND

The parties to this matter previously appeared before the Zoning Commissioner on a Petition for Special Hearing where the Petitioners attempted to “invalidate a fishing and shell fishing facility for non-conforming use or otherwise.” *See* Case No. 2010-0220-SPH. Following a public hearing that was attended by numerous interested persons, the Zoning Commissioner

¹ The Motion to Dismiss a preliminary motion filed to exclude a hearing on the merits of the Petition for Special Hearing filed by neighboring property owners who seek to restrict or limit the commercial fishing and crabbing activities at 2534 Island View Road. Specifically, Petitioners have requested a hearing to determine whether the scope and intensification of fishing and shellfishing allowed by the use permit has been exceeded.

issued an Order dated April 19, 2010 denying the Petition for Special Hearing and finding that the Owners/Respondents are entitled to conduct a commercial fishing, crabbing or shellfishing operation on the subject property. *Id.*

The Petitioners filed a timely Motion for Reconsideration, raising for the first time the contention that the Respondent “is operating at an intensity that is above that which existed in 1978, and thus does not reflect the intent of the zoning code.” The Motion for Reconsideration was denied and the undersigned Zoning Commissioner held that the issue of intensification was not presented or argued at the public hearing on April 8, 2010 and that the Commissioner therefore lacked jurisdiction over that question. Specifically, the Ruling on Petitioner’s Motion for Consideration held as follows:

“This Commission does not have jurisdiction to review Petitioners’ Motion for Reconsideration and finds that the Motion predicated on materially different issues must be denied and that Petitioners’ are instructed to file a new Petition with the Department of Permits and Development Management (DPDM) raising the central issue of intensification of use at this location and request a new hearing after proper notice is provided in accordance with the B.C.Z.R. and Baltimore County Code (B.C.C.).”

Ruling on Motion for Reconsideration, p. 3.

The Petitioners followed this Ruling and filed the instant Petition for Special Hearing “*to determine whether the scope and intensification of Fishing and Shellfishing allowed by the Use Permit has been exceeded.*” The Respondents then filed a Motion to Dismiss arguing that the Petition is barred by *res judicata*, and the Petitioners and Peter Max Zimmerman, People’s Counsel, filed Responses to the Motion. The parties appeared for a public hearing on the Motion to Dismiss and presented oral argument to the Zoning Commissioner.

RULING

After considering the written memoranda and oral argument presented in this matter, I do not find that the instant petition is barred by *res judicata* and therefore shall deny the Respondents' Motion to Dismiss. As the Respondents state in their Motion, the test for whether a legal determination should be given preclusive effect hinges on three factors:

- (1) whether the [agency] was acting in a judicial capacity;
- (2) whether the issue presented to the [reviewing] court was actually litigated before the [agency]; and
- (3) whether its resolution was necessary to the [agency's] decision.

Batson v. Shiflett, 86 Md.App. 340, 356 (1991); *See also Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc.*, 192 Md.App. 719, 736 (2010).

While the Respondents are correct in stating that the Zoning Commissioner has already reviewed a petition for special hearing involving the same parties and property, I find that *res judicata* does not bar the instant petition for special hearing because the issue now presented to the Zoning Commissioner was not "actually litigated" before the Zoning Commissioner within the confines of the prior petition. Indeed, the Petitioners filed a Motion for Reconsideration following the denial of their prior petition for special hearing and this office denied the Motion due to the fact that the issue of intensification was not presented, argued, or considered in the first petition. The Ruling denying the Motion for Reconsideration specifically noted that the issue before the Zoning Commissioner in the first petition was "the validity of the Use Permit based upon legislative actions, prior approvals and applicable law." *See* Ruling, p. 2. The undersigned Commissioner was not presented with evidence concerning intensification of the use allowed by the permit, and did not consider the imposition of conditions limiting the activity or number of crab pots that can be stored at 2534 Island View Road. Furthermore, the Petitioners were directly instructed in the Ruling to file a new Petition raising the issue of

intensification of use at this location. *Id.* at p. 3. Accordingly, it would be patently unfair to now dismiss this Petition without giving the Petitioners the opportunity to raise an issue that was not litigated in their prior petition.

This Motion does raise an important distinction between the doctrines of *res judicata* and *collateral estoppel*. Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *John Crane, Inc. v. Puller*, 169 Md.App. 1, 24 (2006). Under the doctrine of *collateral estoppel*, on the other hand, the second action is based upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. *Id.* at 24-25.

There is no question that this Commission has already reached a final determination that the Respondents are entitled to conduct a commercial fishing and shellfishing operation on the subject property under a Use Permit dated October 9, 1978. *See* Case No. 2010-0220-SPH, p. 10. For the purposes of the instant Petition, this issue will not be revisited as any new evidence on this point is barred by *collateral estoppel*. However, the Zoning Commissioner also determined that “any such use existing on the date of enactment of the law could continue only *at the same level of intensity* and that “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.” *Id.* The parties did not raise the issue of intensification in the prior Petition and it was not actually litigated in Case No. 2010-0220-SPH. Accordingly, the instant petition will be permitted to proceed on the limited issue of whether the Owners/Respondents have exceeded the scope and intensification of fishing and shellfishing allowed by the use permit.

FINAL ORDER SUBJECT TO APPEAL

While ordinarily an appeal is only available when a final order disposes all claims between parties, interlocutory orders in the Circuit Court arena are immediately appealable under three (3) exceptions. Those exceptions are: “appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine.” *Schuele v. Case Handyman and Remodeling Services, LLC*, 412 Md. 555, 566 (2010).

In the case before me, I find that my denial of the Respondents’ Motion to Dismiss is immediately appealable under the collateral order doctrine, which requires that an interlocutory order: (1) conclusively determines a disputed question, (2) resolves an important issue, (3) resolves an issue that is completely separate from the merits of the action, and (4) would be effectively unreviewable if the appeal had to await the entry of a final judgment. *Id.* at 572. My denial of the Respondents’ Motion determines an important, disputed question that is separate from the merits of the action and would essentially be unreviewable once the parties and the new Office of Administrative Hearings (currently Zoning Commissioner’s Office) commence a lengthy hearing to reach a final judgment on the merits.

While this office understands that interlocutory appeals are generally disfavored, this case presents the rare scenario where the final determination of a preliminary legal issue would serve to lessen the burden on the administrative review process and promote judicial economy. This is not a decision that this Commission takes lightly, but this case requiring evidence encompassing a thirty (30) year period of time could result in a particularly lengthy and complex hearing that is potentially avoidable if the Board of Appeals has an initial opportunity to determine the legal issue presented in the Respondents’ Motion to Dismiss. Since this scenario falls under the

collateral order doctrine, I find that this decision constitutes a final order and is therefore subject to immediate appeal should the aggrieved parties chose to do so.

WHEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 20th day of December, 2010, that the Motion to Dismiss filed in the above-captioned matter be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that this ruling constitutes a final order subject to an appeal if filed within thirty (30) days of the date hereof.

WJW:dlw

____SIGNED_____
WILLIAM J. WISEMAN, III
Zoning Commissioner
for Baltimore County