

IN RE: PETITION FOR SPECIAL EXCEPTION *		BEFORE THE
(826 Chester Road)		
15 th Election District	*	OFFICE OF
6 th Councilman District		
James Dimick, Jr. & Robert George Dimick	*	ADMINISTRATIVE HEARINGS
<i>Legal Owners</i>		
Petitioners	*	FOR BALTIMORE COUNTY
	*	Case No. 2014-0123-X

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Exception filed for property located at 826 Chester Road. The Petition was filed by Lawrence E. Schmidt, Esquire, on behalf of the legal owners of the subject property, James Dimick, Jr. and Robert George Dimick. The Special Exception Petition seeks relief pursuant to §1B01.1.C.8 of the Baltimore County Zoning Regulations (B.C.Z.R.), for a fishing and shellfishing facility, shoreline, Class II as provided in B.C.Z.R. §B01.1.C.8 if the Administrative Law Judge does not determine that the plan updating the use permit for a commercial fishing, crabbing and shellfish operation dated March 2, 1979 renders this request moot. The subject property and requested relief are more fully described on the site plan which was marked and accepted into evidence as Petitioners' Exhibit 1.

Appearing at the hearing was James and Robert Dimick and Bernadette Moskunas with Site Rite Surveying, Inc. the firm that prepared the site plan. Lawrence E. Schmidt, Esquire of Smith, Gildea & Schmidt, LLC attended and represented the Petitioners. The file reveals that the Petition was advertised and posted as required by the B.C.Z.R. The next door neighbor (Glenn Dowell) and Allen Robertson, a Bowley's Quarters resident, attended the hearing and opposed the

petition. Mr. Robertson also submitted a post hearing memorandum, which is included in the case file.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. Substantive comments were submitted by the Department of Planning (DOP) and Department of Environmental Protection and Sustainability (DEPS). The DOP requested that certain conditions be imposed upon any Order granting relief, and the DEPS noted Petitioners must comply with Critical Area regulations.

Testimony and evidence offered at the hearing revealed that the subject property is 0.286 ± acres and is zoned DR 3.5. The Petitioners' parents--now deceased-- purchased the property in 1958, and in 1979 (Petitioners Exhibit No. 4) they were granted a use permit to operate a "commercial fishing, crabbing and shellfish operation." The property was the subject of a recent code enforcement case (Citation No. 136762), and the Petitioners seek zoning relief to clarify their rights concerning the scope of the shellfish operation.

As a preliminary matter, Petitioners contend special exception relief is required only if the ALJ determines that the current operation is not "grandfathered" under the 1979 use permit. While the law provides few details concerning the validity and duration of such permits, I do not believe the current operation as described is within the scope of the approval granted by former Zoning Commissioner DiNenna. That Order noted "approximately 25%" of the property would be used for the shellfish operation. Based upon the photos in the file, I believe that Petitioners are devoting more than 25% of the property to this use. In addition, the site plan accompanying the permit indicates that the crab pots are to be stored in a 4' x 33' area on the west side of the home. As shown in the photos, the crab pots are not stored in this area. Thus, I believe that a special

exception is required in order to lawfully conduct the operation as currently described and depicted.

Prior to addressing that issue, I would note that the parties spent a great deal of time bickering over whether the subject property was the primary residence of the Petitioner(s). This is irrelevant; it is only the Class I shellfishing facility that imposes such a residency requirement, not the Class II facility for which Petitioners seek approval.

Also, the BCZR does not restrict to 25% the area of the site which may be used for the shellfishing operation. The BCZR defines a “shellfishing facility” as a “**principal use** that consists of the buildings, equipment or other facilities necessary to accommodate the onshore activities of a fishing and shellfishing business (including retailing or wholesaling of the catches).....” BCZR § 101.1 (emphasis added). Under the regulations, a “principal use” is a “main use of land, as distinguished from an accessory use.” *Id.* As such, the shellfishing operation is permitted—assuming the special exception is granted—to be the “main” use of this lot, which I believe is in fact the case. I will therefore not include in the order which follows the 25% area restriction suggested by the DOP, which would be more appropriate in a case where the use in question was accessory. The regulations also permit retail sales from the premises, although I do not believe that would be appropriate in this setting, and a prohibition on such sales will be included in the Order.

Special Exception Law in Maryland

In AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681 (1998), the court ruled that the test in evaluating a special exception or conditional use is not whether a special exception is compatible with permitted uses in a zone or whether a conditional use will have adverse effects. Adverse effects are inherent in all conditional or special exception

uses. The standard is whether the adverse effects of the use at the particular location proposed would be greater than the adverse effects ordinarily associated with that use elsewhere within the same zone.

A use permitted by special exception (here, a shellfishing operation) is presumed under the law to be in the public interest, and to defeat such a petition, the Protestants must establish that the inherent adverse effects associated with the use would be greater at the proposed location than at other similar zones throughout the County. People's Counsel for Baltimore County v. Loyola College in Md., 406 Md. 54 (2008). Stated more eloquently, the court in Schultz stated the applicable test in this fashion:

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.

Schultz v. Pritts, 291 Md. 1, 22-23 (1981).

Thus, a special exception use is presumed to be proper at the location, unless an opponent can show that the inherent adverse effects would be greater at the subject site than at other locations in the DR 3.5 zone. Here, Messrs. Dowell & Robertson indicated the operation was unsightly, noisy, created odors and had the potential to decrease their property values. Though it may sound illogical, these are the types of inherent adverse effects that the legislature was presumed to have anticipated when it allowed by special exception fishing and shellfishing operations in residential zones. In other words, most uses for which a special exception is required

are regarded as “potentially troublesome because of noise, traffic, congestion....” Montgomery County v. Butler, 417 Md. 271, 297 (2010). Indeed, in the few cases heard by the undersigned, neighbors articulated exactly these same concerns in opposing such shellfishing operations. As such, I do not believe the Protestants successfully rebutted the presumption created by Maryland law. Even so, I will impose certain conditions in the order granting relief to reduce—to the extent possible—the potential for conflicts with neighboring owners.

Pursuant to the advertisement, posting of the property, and public hearing on this petition, and after considering the testimony and evidence offered, I find that Petitioners’ Special Exception request should be granted, subject to the conditions noted below.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this 16th day of January, 2014, that the Petition for Special Exception relief under §1B01.1.C.8 of the Baltimore County Zoning Regulations (B.C.Z.R.), for a fishing and shellfishing facility, shoreline, Class II, be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for appropriate 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 return, and be responsible for returning, said property to its original condition.
2. No signage shall be posted on the premises.
3. The Petitioners shall be permitted to keep at the site no more than two (2) commercial fishing boats (with a maximum length of 45’) at any one time. This limitation does not apply to jet skis or other “pleasure” boats.
4. There shall be no retail sales on the premises.
5. The subject property shall be kept neat and clean at all times, and shall be kept free of junk, trash or debris.

6. The Petitioners shall be permitted to have fuel(s) delivered to the premises Monday through Friday between the hours of 9:00 am – 5:00 pm only.
7. The Petitioners shall be permitted to clean, paint and/or repair the crab traps stored on site Monday through Friday between the hours of 9:00 am – 5:00 pm only.
8. The Petitioners must comply with the ZAC comment of DEPS, dated January 9, 2014.

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

JEB/sln

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County