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| IN RE: **PETITION FOR SPECIAL HEARING (14721 Manor Road)** | * | BEFORE THE |
| 10th Election District | * | OFFICE OF |
| 3rd Council District | | |
| Jacqueline R. Frank, *Legal Owner* | * | ADMINISTRATIVE HEARINGS |
| | * | FOR BALTIMORE COUNTY |
| Petitioner | * | **Case No. 2019-0437-SPH** |

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**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings ("OAH") for consideration of a Petition for Special Hearing filed on behalf of Jacqueline R. Frank, legal owner ("Petitioner"). The Special Hearing was filed pursuant to Section 104.1 of the Baltimore County Zoning Regulations ("BCZR") to approve a nonconforming apartment building use (i.e., three-apartment/dwelling units) on the subject property. A site plan was marked and admitted as Petitioner's Exhibit 1.

This matter was heard on two dates, November 15, 2019 and July 21, 2020. Due to the COVID-19 pandemic, a public WebEx hearing was conducted for the second date in lieu of an in-person public hearing. Jacqueline R. Frank appeared in support of the petition. Lawrence E. Schmidt, Esq. represented the Petitioner. A number of neighbors and citizens attended the hearing as protestants, and their names are listed on the sign-in sheet. At the second hearing, Mr. Schmidt continued to represent the Petitioner. Protestants included Rebecca Heyman Magaziner, Esq., Steven Weinberg and John Raley. The Petition was advertised and posted as required by the BCZR. Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning ("DOP") and the Department of Environmental Protection and Sustainability ("DEPS"). Neither agency opposed the request.

The subject property is 1.410 acres in size and zoned RC-5. The law as regards non-conforming use is clear and well settled. As stated in Petitioner's Memorandum:

> "A non-conforming use is a 'grandfathered' use. The BCZR recognizes that some uses of land are not permitted under a property's existing zoning classification but that those uses pre-date the date when the zoning classification/regulation prohibiting the use became applicable. A valid and lawful nonconforming use is established if the owner can demonstrate that *before and at the time* of the adoption of a new zoning classification/ordinance, the property was being used in a lawful manner that, by later legislation, became non-permitted. *Trip Assoes., Inc. v. Mayor and City Council of Baltimore*, 392 Md. 563, 569 (2006).
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> In Baltimore County, the law regarding nonconforming uses is set forth in Section 104.1 of the BCZR, which provides:
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> A nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations, provided that upon any change from such nonconforming use to any other use whatsoever or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate." (Emphasis Added)

The burden of proving the existence of a lawful nonconforming use falls upon the party asserting that claim. *County Comm'rs of Carroll County v. Uhler*, 78 Md. App. 140 (1989). Nonconforming uses are disfavored and the goal of zoning is to eliminate nonconforming uses through "economic attrition and physical obsolescence." *Prince George's County v. E.L. Gardner,* Inc., 293 Md. 259, 268 (1982).

The two questions to be resolved in this matter: (1) Whether or not the use of the subject property existed prior to the inception of a zoning regulation prohibiting that use; and (2) If so, whether that use continued interruptedly and was not abandoned or discontinued for a period of one year or more.

As to the first issue, People's Counsel makes a concerted effort to establish the date of the applicable zoning regulations which prohibit the Petitioner's use as far back as 1945. He bases his contention primarily on a memorandum supplied by Mr. Perlow of the Baltimore County Office of Zoning Review. I have reviewed Mr. Perlow's memo. I agree with Petitioner's counsel that the map of the sixth zone set out in the 1945 zoning is illegible, and of no probative use. Mr. Perlow notes that there are no maps for the 1955 – 1971 era, when regulations were promulgated. Based on the date of purchase by the Petitioner and testimony as to the creation and use for three apartments; and the requirements of the applicable zoning regulations prior to 1971, I find that the applicable date for this inquiry is in fact 1971, which would "grandfather" the use. Earlier regulations appear to have allowed one-family as well as two-family homes. There was no limitation of only one such structure on the property.

Testimony of all of Petitioner's witnesses and even some of the Protestants, establish that there are two structures on the property; namely one with two apartments and one with an apartment over a separate garage.

Having determined that the zoning regulations of 1971 are operative in this case, Petitioner's greater problem is establishing that the nonconforming use has continued uninterruptedly since before 1971. On the first day of the hearing, Mitchell Kellman, a land planner for Daft, McCune & Walker, appeared on behalf of the Petitioner and was accepted as an expert witness in land planning and the Baltimore County Zoning Regulations. He described the property as, in fact, having two buildings with the primary structure being built in 1898. He stated that he reviewed the land records provided by the State Department of Assessments and Taxation and testified that since 1965 two families, the Lintz's, and since 1983, the Frank's, have owned the property.

In response to questions from Protestants, the witness acknowledged that Mr. Frank was deceased and that none of the deeds described the residence as a two-family unit, nor that there was a residence over the garage.

Petitioners Counsel proffered testimony on behalf of Mrs. Frank that she would testify that since she had been living on the property, the two apartments in the main house and the apartment over the garage had been rented continuously. She further stated that Mr. Lintz, the previous owner, told her that the three apartments had been continuously rented since 1966 and that he had three separate meters installed by Baltimore Gas and Electric ("BGE") when the barn was built and the third apartment was created. Finally, he proffered that she would also testify that her late husband had managed the property until his death. Unfortunately, she acknowledged that she had "cleaned out his papers" after his demise.

Cynthia Wates-Balog testified that the main house had two separate entrances, separate kitchens and two bedrooms each.

At this point, counsel for the Petitioner requested a continuance of the hearing in order to obtain from BGE any records related to the three meters on the property. He stated for the record that he had been unsuccessful to that time in obtaining a response to his requests. He was granted the continuance. Unfortunately, the continuance was initially granted until February 28, 2020. Thereafter, while arranging a new date acceptable to all parties, matters were significantly delayed as a result of the COVID-19 pandemic. With the partial reopening of County departments, including the establishment of virtual hearings for the OAH, a hearing date was set for July 21, 2020.

A word needs to be said at this point regarding objections raised by some Protestants and People's Counsel as to the presentation not only of BGE records but of additional testimony and

evidence by counsel for the Petitioner in the July 21, 2020 hearing. The OAH, being administrative in nature, is not bound to the rigid rules of evidence found in the District or Circuit Courts. Rather, I believe that our hearings are a search for the truth and proper determination of matters before us. To that end, I allowed additional evidence and testimony to be presented.

The deed to Mr. Lintz dated in 1958 was presented, to establish clearly the ownership of the Lintz family through Mrs. Frank for some 62 years. A letter to Mrs. Frank from BGE set out that a "PS" meter was installed on the property in 1966. However, no documentation from BGE was presented to establish that three separate meters were installed (one for each apartment); nor were any bills or statements for separate electric service to the three apartments provided.

Howard Lintz, son of the owner previous to the Franks, was presented as a witness by the Petitioner. Counsel also submitted an affidavit signed by the witness, dated July 8, 2020. Mr. Lintz testified that he and his wife moved into one of the two apartments in the main house in 1968. He further stated that they moved out in 1977, but that while they lived there, a second tenant occupied the other apartment. He added that the third apartment over the barn was also continuously occupied while he and his wife resided on the property. He noted that he was still familiar with the property, having moved only a short distance away; and related that he often sees multiple cars in the driveway.

In response to questions posed by Protestants, he acknowledged that he couldn't tell who owned the cars; and that he "assumed" they belonged to residents of the three apartments. He conceded that he has no personal knowledge concerning the site since he moved out. He also stated that he received his own BGE bill while residing on the subject property, but never handled any business records for his father.

Upon questioning by Mr. Zimmerman, Mr. Lintz stated that "since he was five years old, a 'handyman' or tenant always resided in the apartment over the garage" (the barn). He recalled that his parents always had leases for their tenants (including him); although he doesn't now have a copy of his lease. Finally, he recalled a tenant who lived there from 1970 to 1977, but that after that date, he acknowledged that he had no direct connection with the property.

Kristine Derkach testified that she lived in the upstairs apartment from 1999 to 2016 and for a short period of time in 2017 in the apartment over the garage. She recalls that during that time someone lived in the other apartment and that, when she was in the main house the apartment over the garage was also occupied.

She recalled that there were two BGE meters on the house and one on the barn (or garage?) apartment. She related that she had a signed lease and her own separate BGE bill. Finally, she stated that, throughout her tenancy, she believes all apartments were occupied.

Steven Weinberg, who lives across the street from the subject property, offered a photo which suggests, along with his personal knowledge, that the main house "over the past year" is dark and that there is visible construction debris. He stated that to his knowledge, not all of the three units have been rented for most of the year. In response to a question from Petitioner's counsel, he did acknowledge that there had been a County's zoning violation that was issued on the property in 2019.

Mr. Weinberg's comment of no occupancy for "a year or so" calls for a comment. As Petitioner's counsel points out in his Memorandum, the subject property was cited on July 25, 2019 for "failure to cease illegal conversion of dwelling, failure to convert dwelling back to a single family residence". By an Order dated August 14, 2019, the Petitioner was fined $6,000. A notice of the fine also stated, "Please note that the Administrative Law Judge's Final Order requires

you to correct within seven days the violation detailed in the Citation." The Order and notice placed the Petitioner in a true "rock or hard place" position. If she continued to rent the three units, she would be in continuing violation of the Order and subject to further fines. If she ceased renting the apartments pending this special hearing case, the "one-year abandonment" could be tolled against her. It should be noted that the Petitioner, a senior citizen with some cognitive issues, failed to appear at the violation hearing. Therefore, no evidence supporting or contradicting the violation was presented; neither was there a "finding" based on any evidence as to the violation. As the judge who solely hears the code enforcement violation dockets for the past ten years, I must note that, even if I found the Petitioner in violation, I would likely have stayed any further citations or need to remove any tenants pending the result of the special hearing case on the site's nonconforming status. Therefore, I cannot in good conscious count the period from August 14, 2019 to the present against the Petitioner.

Having so stated, the question is whether or not there has been an abandonment or discontinuance of the nonconforming use under Section 104.1 of the BCZR. As set out above, the burden is completely upon the Petitioner to prove that there was no fatal interruption in the nonconforming use. As a nonconforming use is disfavored under the zoning regulations, the burden to establish that a nonconforming use should be allowed to continue must be strictly construed against the Petitioner.

Unfortunately in this case, that burden is problematic for the Petitioner. I believe there is sufficient testimony to support the existence of three apartments on the subject property. I also believe that, based on the testimony of Mr. Lintz and Ms. Derkach there is sufficient testimony to establish that BGE installed meters and sent statements to individual tenants. However, there is little support for the premise that the three tenant nonconforming use has continued without

interruption since its inception. There is the proffered testimony of the Petitioner and there are "assumptions" and "beliefs" by the Petitioner's witnesses. Even if their testimony is to be believed, Mr. Lintz can only testify as to the period of 1968 to 1977 and Ms. Derkach the period from 1990 to 2018. There are therefore significant caps not addressed by any of the Petitioner's witnesses.

Finally, as each of the Protestants Memoranda point out, there is no supporting documentary evidence presented by the Petitioner in support of her case. Other than the letter from BGE as to the "PS" meters, there are no copies of leases or BGE statements and bills to support Petitioner's claim. Likewise, there are no tax returns showing rental income and expenses. Finally, even though Baltimore County has required rental licenses for a number of years, Petitioner never requested any licenses nor were any licenses ever issued by Baltimore County for any of the three apartments.

I come therefore to the conclusion that the Petitioner has not met her significant burden of establishing that there has been no discontinuance or abandonment of the property's nonconforming use as set out in Section 104.1 of the BCZR.

THEREFORE, IT IS ORDERED this **3rd** day of **September, 2020** by this Administrative Law Judge, that the Petition for Special Hearing to approve a nonconforming apartment building use (i.e., three-apartment/dwelling units) on the subject property, be and is hereby DENIED.

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

_____Signed_____
LAWRENCE M. STAHL
Administrative Law Judge
for Baltimore County

LMS:dlw