

MINUTES

The Salisbury Board of Zoning Appeals met in regular session on June 3, 2010, in Room 301, Government Office Building at 7:00 p.m. with attendance as follows:

BOARD MEMBERS:

Patricia Layton, Chairman (Absent)
Dave Rainey, Vice Chairman
Daniel Baker
Edgar Williams (Absent)
Dave Nemazie

CITY OFFICIALS:

Henry Eure, Building, Permits & Inspections Dept.
Bill Holland, Building, Permits & Inspections Dept.
Skip Cornbrooks, City Attorney's Office

PLANNING STAFF:

Gloria Smith, Planner
Jack Lenox, Director
Beverly Tull, Recording Secretary



Mr. Rainey, Vice Chairman, called the meeting to order at 7:00 p.m.

**MINUTES:**

The approved the March 31, 2010 and the May 6, 2010 minutes as submitted.

**#SA-1008****Brian P. Deweerdt – Administrative Appeal – Determination regarding an Illegal Two-Family Dwelling – 807 South Division Street – R-8 Residential District.**

Mr. Tom Maloney, Ms. Laura Borowsky and Mr. Brian Deweerdt came forward. Mrs. Gloria Smith presented and entered the Staff Report and all accompanying documentation into the record. She summarized the Staff Report explaining that the applicant owns a residential property at 807 South Division Street that is being used as a two-family residence. The property is zoned R-8 Residential, which does not allow two-family residences.

Mr. Eure stated that the Building Department concurred with the Staff Report. He recommended that the Board uphold the Building Department's decision with the same condition listed in the Staff Report.

Mr. Maloney introduced himself, Ms. Laura Borowsky, and Mr. Brian Deweerdt. He requested to handle some procedural issues before proceeding with the case. Mr. Cornbrooks added that the issues were present in both cases and if they were handled now Mr. Lenox would only have to testify once.

Mr. Maloney stated that he had sent a letter to Mrs. Layton on May 26, 2010 regarding procedural issues. There are two (2) issues. The first issue is that when the hearings are scheduled, there really isn't enough time to prepare the necessary research that is needed in these cases. Mr. Maloney stated that they research the property back to the first deed that they can find and then try to contact people for testimony. In theory, properties have been traced back to 1942 and only having 30 days is almost impossible. Mr. Maloney stated that he would like the Board to decide that the applicant can have at least 60 days to research a property before

coming before the Board. Mr. Cornbrooks stated that the Board's authority to adopt rules won't be in conflict with the Code. He stated that the Board should take Mr. Maloney's thoughts under suggestion. Mr. Rainey stated that the Board has always given an extension when it was requested and that he didn't believe that this required a rule change. Mr. Maloney stated that if an extension was denied that it would put a hardship on his client. Mr. Rainey stated that he had been on the Board for over 15 years and had never known the Board to deny an extension request.

Mr. Maloney stated that the second issue was the advertising fees. When his clients filed the appeal, they had to write a check to the City for \$50 and a check to the County for \$100. A policy change went into effect and the applicants are now sent a bill to cover the advertising fees. Mr. Maloney stated that he didn't know where this requirement had come from because it is not in the Code. Mr. Lenox stated that over the past few months the City and the County have been going through an interesting budget time. The \$50 check to the City and the \$100 check to the County aren't covering the indirect or the direct costs, specifically the advertising fees. One (1) individual ad can cost at least \$200. The City Council has had to appropriate money to cover the advertising costs in the past. This is no longer an option. When a case comes up for rezoning, the applicant's are charged for the advertising fees directly. The code is silent as to who pays the fees. It was with the consensus of the Mayor's Office to enact the change that the applicant pays the advertising costs. The City Council did not appropriate any money in the next budget to cover any legal ads.

Mr. Nemazie questioned Mr. Lenox when this change started. Mr. Lenox responded that the change was enacted with this meeting.

Mr. Cornbrooks stated that this is an issue that the citizens can address through the legislative body. If the Board felt the need it could adopt a rule or regulation approving such a thing but the weight that would carry is dubious. The question that is being raised is if the Mayor through a Department has the authority to adopt an Administrative Policy Change, which this Board has no authority to decide.

Mr. Nemazie questioned Mr. Lenox if the applicant's were notified that they have to pay the advertising fees. Mr. Eure responded in the affirmative, explaining that the form is part of the application package. Mrs. Smith added that the applicants are asked to sign the form that they will be required to pay the advertising fees.

Mr. Rainey stated that the fees are set by the Administration and that the Board can't change that.

Mr. Maloney stated that he would take the question to the City Council. He stated that the reason why he brought it up was because if you look at your Code it talks about the Board of Zoning Appeals. The sentence that they are

relying on simply reads *The Board should pick a reasonable time and place for the public hearing of an application, appeal or other matter, give public notice thereof* and based on that give public notice thereof has raised the fee issue and whether the regulations that govern that say that the applicant shall pay all advertising fees.

Mr. Rainey reiterated that the fee structures are set by the Administration and the Board doesn't deal with fees.

Mr. Maloney stated that they hadn't submitted any evidence because they were still receiving stuff as of the day before the meeting. Mr. Deweerdt purchased the property at the age of 18 in April of 2006 and picked this property because he needed the two (2) units in order to live in one and lease the other to make the mortgage payments. He stated that when the property was purchased it came with a tenant that had lived there for approximately 10 years and stayed two (2) more years after Mr. Deweerdt purchased the property. When the title was traced back to the first deed of record, it went before 1959 for conversion. Mr. Maloney stated that he had a paralegal go to Mr. Holland's office and there wasn't any information in respect to building permits because there is a policy in the City to not keep stuff from many years back.

Back in the day, when people applied for permits, the City kept a Book of Account for the plumbing and building permits and it goes back to 1947. Mr. Maloney had a paralegal research these books to get information. **Applicant's Exhibit B** was an affidavit from Ms. Carolyn Wanex whose parents purchased this property in September 30, 1954. The affidavit included the deed. The property was immediately converted to a two-family residence in order to provide rental income for the family. The property was sold in 1989 and occupied by two (2) families the entire time until it was sold to Nelson and Pat Malone. The building permit data for the City of Salisbury were submitted as **Applicant Exhibit C**. The third page of the printed receipts lists the first and second floor of the house being used for residential. The hand written ledger shows that a plumbing permit was issued on May 10, 1954 and the cost was \$1. In August 1955, Mr. Norman Baker had some plumbing work done and the permit cost \$1.50. On July 20, 1955, Mr. Baker requested a permit for an addition. The only information that can be found is what is left in the permit office. The record of permits issued from 1947 until this information began being computerized and the information is consistent with the affidavit and the City's records. The affidavit and the recollections concur with the permit records.

The Wanex affidavit also indicated that the property was continuously occupied until September 15, 1989 when it was sold to Nelson and Pat Malone, who owned it until October 31, 1997. **Applicant's Exhibit D** was Mr. Malone's affidavit and deed which states that the property was always occupied by two (2) families. The property owners after the Malone's were unable to be located. Mr. Deweerdt bought the property in April 2006 and it has been occupied with the

exception of the few months that he was working on it. When Mr. Deweerdt purchased the property, it came with a tenant. The tenant had resided at the residence for ten (10) years and remained another two (2) years after Mr. Deweerdt purchased the property. The tenant, Ms. Dorothy Bowser, had lived at the residence since 1996. When Ms. Bowser moved, she was eligible to receive subsidized housing and has not been able to be located. The second floor was renovated when she moved out and then rented out again. The property has been a two (2) family residence since 1955 and in continuous use for 55 years. **Applicant's Exhibit E** was entered as Mr. Deweerdt's affidavit and deed.

Mr. Maloney stated that there are many of these cases coming to the Board, starting with 12 next month. These cases evolve around nonconformity and how long ago these properties were converted. Mr. Maloney submitted a Memorandum of Law on the Doctrine of Zoning Estoppel. The Doctrine of Zoning Estoppel says "that a local government exercising its zoning powers will be estopped, meaning stopped or prohibited, when a property owner relying in good faith upon some act or mission of the government has made such a substantial change in position or incurs such an extensive obligation and expenses that it would be highly inequitable or unjust to destroy the rights which he has extensively acquired."

Mr. Cornbrooks stated that within the last two (2) years the Court of Appeals, in an opinion by Judge Adkins, has rejected the Zoning Estoppel in the State of Maryland. Mr. Maloney responded that he didn't believe that was a statement of the current law.

Mr. Rainey stated that the Board was only there to hear the Administrative Appeal.

Mr. Maloney stated that he was trying to build a file in case it is needed. The Maryland Court of Special Appeals has adopted the Zoning Estoppel in at least three (3) cases. In March of this year, the Court of Appeals in a case, Maryland Reclamation Associates, did not adopt the Doctrine of Zoning Estoppel because the facts of the case did not support its adoption. He submitted his Memorandum of Law because he believes that it applies to all his cases and it will continue to be submitted for the record. This Memorandum of Law on the Zoning Estoppel was submitted as **Applicant's Exhibit F**.

Mr. Rainey questioned testimony and if it was the City's burden to prove otherwise. Mr. Cornbrooks responded that the City went first and the burden then switches to the applicant. The Board must weigh the credibility of the evidence against what the City has.

Mr. Nemazie questioned if the decision is based solely on how the Board weighs the evidence. Mr. Cornbrooks responded that the evidence is more likely to be true than not true.

Mr. Baker stated that he had an issue with whether or not the lot width and area had to be dealt with. Mr. Eure responded that the lot width and area didn't need to be dealt with if it was a two family dwelling prior to 1983.

Mr. Rainey stated that affidavits have been presented for all time periods except 1997 through 2006, where the Board must rely on the testimony from the current owner who got the information from his tenant.

Mr. Maloney stated that he can only show what the deed shows. Mr. Deweerdt's affidavit, paragraph 3, indicates that Ms. Bowser stated that the property was always occupied in both units.

Mr. Cornbrooks noted that in a Court of Law that the testimony would be considered hear-say.

Mr. Rainey stated that the burden of proof switched to the City to provide otherwise.

Mr. Maloney stated that it is quite natural for the owner to have conversations with the tenants. He added that the City doesn't have anything else to provide information that the property wasn't occupied by two (2) families during that time period.

Upon a motion by Mr. Baker, seconded by Mr. Nemazie, and duly carried, the Board **UPHELD** the Applicant's contention that the two-family residence at 807 South Division Street is a legal nonconforming use, and may continue to operate as such, subject to all requirements of Salisbury's Zoning Code as to legal nonconforming uses.



#SA-1009

**Michael Tobolski & Christine Meer – Administrative Appeal
– Determination regarding an Illegal Two-Family Dwelling
– 614 Smith Street – R-8 Residential District.**

Mr. Tom Maloney, Ms. Laura Borowsky, and Mr. Michael Tobolski came forward. Mrs. Gloria Smith presented and entered the Staff Report and all

accompanying documentation into the record. She summarized the Staff Report explaining that the applicants own a residential property at 614 Smith Street that is being used as a two-family residence. The property is zoned R-8 Residential, which does not allow two-family residences.

Mr. Eure stated that there isn't anything to refute the claim and requested that the Board uphold the Building Department's determination.

Mr. Maloney stated that the chain of title is fairly long on this property. **Applicant's Exhibit B** was submitted as an affidavit from Shirley Paucchi, a real estate clerk in Mr. Webster's office for over 40 years. Ms. Paucchi states in her affidavit that she lived next door to 614 Smith Street from 1942 until 1947 and that it was continuously occupied as a two family residence.

Applicant's Exhibit C was submitted as an affidavit from Richard Shockley, stating that he lived at 314 Smith Street, which is now 614 Smith Street, from 1953 until 1959 and it was always a two family residence and occupied. **Applicant's Exhibit D** was submitted as Marion Kent's affidavit explaining that his parents owned the property from 1937 until 1965 and that the property was two units in 1937.

In 1965, Mr. Kent's parents sold the property to Katherine Tull, who was an occupant of the residence and babysat for Mr. Kent from 1961-1980. There is a gap from Mr. Kent to Mr. Gilkerson. Mr. Gilkerson purchased the property on June 27, 1983 for a rental unit. **Applicant's Exhibit E** was submitted as an affidavit from Mr. Gilkerson stating that he sold the property to Tarr Rentals on September 25, 1985 and that the property was a two family residence with Ms. Tull living on the 2nd floor.

Tarr Rentals owned the property until 2005. **Applicant's Exhibit F** was submitted as an affidavit from Lisa Tarr who gave 20 years of history on the property. **Applicant's Exhibit G** was submitted as an affidavit from Desiree Martin who was a tenant that occupied a unit at 616 Smith Street from 1985 until 1987 and stated that both units were occupied continuously during that time.

From 2005 until the present, Mr. Tobolski and Ms. Meers have owned the property and both units have been occupied. The property has been in continuous use as a two family residence for almost 75 years. Mr. Maloney added that he couldn't locate a permit in the Building Department because their records begin in 1947.

Mr. Rainey questioned that the new Code was adopted in 1983. Mr. Eure responded that the new Code was adopted May 23, 1983. Mr. Rainey stated that anything after 1983 would require a special exception. Mr. Eure responded in the affirmative.

Mr. Nemazie stated that they Board had been hit with a lot of affidavits but one (1) of them was not notarized. Mr. Maloney responded that the affidavit that wasn't notarized was received in the mail the day before the meeting and that the second sheet wasn't in the envelope.

Mr. Rainey stated that the issue is between May 23 and June 22, 1983 with the Gilkerson affidavit.

Mr. Nemazie questioned if research was being collected up until the meeting, could the Staff request a continuance to be able to review the research before the Board sees it. Mr. Cornbrooks responded that the Staff can not request a continuance. The applicant would have to request the continuance. If the Staff requested a continuance, then the City would have to provide a letter saying that the use was legal. The applicant can request a continuance for more time for research or submitting documentation to the Staff.

Upon a motion by Mr. Nemazie, seconded by Mr. Baker, and duly carried, the Board **UPHELD** the Applicant's contention that the two-family residence at 614 Smith Street is a legal nonconforming use, and may continue to operate as such, subject to all requirements of Salisbury's Zoning Code as to legal nonconforming uses.



ADJOURNMENT

With no further business, the meeting was adjourned at 8:13 p.m.



This is a summary of the proceedings of this meeting. Detailed information is in the permanent files of each case as presented and filed in the Salisbury-Wicomico County Department of Planning, Zoning and Community Development.

Dave Rainey, Vice Chairman

John F. Lenox, Secretary to the Board

Beverly Tull, Recording Secretary