

IN THE MATTER OF THE
THE APPLICATION OF
THE HOMESTEAD GROUP, LTD. AND
RONALD F. JONES, ET UX FOR A
SPECIAL HEARING AND VARIANCE
ON PROPERTY LOCATED ON THE NORTH-
EAST SIDE OF CENTRAL AVENUE, 60
FEET SOUTHEAST OF GLYNDON AVENUE
(207 AND 209 CENTRAL AVENUE,
RESPECTIVELY)
4TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. 89-16-SPHA AND
89-396-SPHA

OPINION

These two cases 89-396-SPHA, Ronald F. Jones, et ux, and 89-16-SPHA, The Homestead Group, Ltd., come before this Board on appeal from a ruling of the Zoning Commissioner denying in part and granting in part said Petitions. These two cases consumed some five days of testimony and evidence.

It is important at the outset to establish just what issues the Board is confronted with. In 89-396-SPHA, the matter is whether or not the structure at 209 Central Avenue is in fact a nonconforming use for six apartments, a variance to permit side yard setbacks of 12 feet zero inches and 12 feet six inches in lieu of the required 20 foot setback for one side and 40 feet or 50 feet the sum of both sides and to permit a total lot width of 65 feet in lieu of the required 90 feet. In case 89-16-SPHA, the Petition is for the Board to find that lot 207 Central Avenue is totally separate from Lot 209 and is unencumbered by any use of 209 and to permit the erection of a building on a 65 foot lot (207) in lieu of the 70 foot lot width in a D.R.3.5 zone. The proposed building to be totally within the D.R.3.5 zoned area.

Counsel for the Petitioner in 89-396-SPHA made Motion to dismiss Protestants' appeal claiming that the required notice period before the Zoning Commissioner was not complied with and

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therefore this Board lacks jurisdiction to hear the case. The Board denied this Motion and assumed jurisdiction.

In light of the fact that much testimony and evidence to be received would be pertinent to both cases, it was decided to hear the cases in combination. At the conclusion of the second witness it became obvious that it was impractical to try these as combined cases and the decision was made to bifurcate the cases and hear case 89-396-SPHA first with the understanding that the testimony and evidence received from the first two witnesses could be applied to both cases.

Much of the testimony received in these five days of hearing was cumulative, was not on point, was alleged testimony, and was to some degree hearsay evidence which in an administrative hearing is permitted. The testimony of each witness will not be detailed in this opinion but let the record speak for itself.

A very brief encapsulation of each witness who testified and their position on the matter before the Board will be stated. Ronald Jones purchased the property known as 209 Central Avenue in June of 1988. It was his understanding that this was a six apartment building with 27 rooms and it was his intention to continue this use. Mr. Jones was aware that in March of 1988 the adjoining vacant lot known as 207 Central Avenue had been sold. Zelma Ensor, a real estate broker, testified as to her familiarity with the property at 209, testified that it had always been an apartment use, that it constituted no detriment to the health and welfare of the neighborhood, and that the house planned for construction on 207 would be nonobjectionable and the plans had

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been accepted by the Landmarks Commission. Aileen Singer testified that she owned Lots 209 and 207 Central Avenue since 1978. She testified as to the use of the property as six apartments, two on each floor, and that she sold it to Mr. Jones as a six apartment use. She alleged that she inquired from Baltimore County as to the feasibility to the separate sale of Lot 207 and received assurances that there was no problem. Cookie Stone, a real estate agent, testified that she handled the sale of 209 Central Avenue.

On July 24, 1990, testimony was taken from Mrs. Sue Susimehl who is 88 years old and resides in California. All proper parties were present for this telephone testimony. Mrs. Susimehl testified that she purchased the two lots in 1941 and that the building on 209 was in existence but was not converted to apartments. Beginning in 1941, she and her husband converted the building to six apartments complete with individual and separate electric meters, kitchens, baths, etc. Her husband, an electrical contractor, did most of the work and the plumbing work was done by a man named Zepp. As this conversion project was undertaken during World War II, plumbing and electrical supplies were scarce. It was Mrs. Susimehl's testimony that because of this scarcity, this conversion took several years but was completed in 1945. It was interesting to the Board to note that this 88 year old lady not only remembered the six apartments but the name of each renter in each apartment. She testified that she sold the property to a Mr. Redder in 1966. She testified that there were six parking spaces along the side of the house adjacent to 207 and that while 207 was used as a driveway it was just a dirt driveway. This concluded

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read into the record their position in opposition to the granting of these Petitions. She further testified that she was acquainted with the property at 209 which prior to 1940 was first a boarding house and then converted to multiple apartments. Nevitt Steele who lives at 211 Central Avenue, next door to 209, testified as to his opposition to the two Petitions. It was his contention that 207 is bifurcated from 209 that the six unit apartment building would no longer be a nonconforming use. This concluded Protestants case in 89-396-SPHA. Testimony was then received in case 89-16-SPHA, The Homestead Group. The first witness from the Homestead Group was Audrey Fox, President of the Homestead Group - Builders. She testified that their business was the design of homes to suit specific sites and specific areas. She testified that the proposed home was approved by the Landmarks Commission and of their agreement to relocate the driveway from 207 to 209. She entered the plans for the proposed building and testified that the proposed house met with approval of both the Landmarks Commission and the National Historic Register. William F. Kirwin, a land planner, testified that this lot is 65 feet wide by some 390 feet deep and that the proposed house meets all the side yard requirements and the only variance needed is the lot width in D.R.3.5 requiring an area variance from 70 feet to the 65 feet as the lot exists. Aileen Singer was then called in this case. She testified that the two lots had always been separate. She further testified that she inquired from Baltimore County as to whether a residence could be built on 207 and as far as she knew there were no problems.

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Colleen T. Chance, the real estate agent, testified she listed 207 and 209 Central Avenue as two listings and was assured by Baltimore County that these were separate and buildable lots. Cookie Stone, a real estate agent actually involved in the sale, testified that she sold 207 to the Homestead Group as a buildable lot. This was the last witness for the Petitioner. Protestants presented Eleanor Taylor who testified as a member of the Board of Historic Glyndon Taylor who testified as a member of the Board of Historic Glyndon and indicated their opposition to the variance as to lot width. She testified that Glyndon Park was founded in 1887 as a vacation resort and that there were large open areas in front of these buildings. In addition to the Board's opposition, she testified her personal opposition since the proposed house would severely reduce the open space now existing on these two lots. Charles Wells, a member of the Board of the Glyndon Community Association, voiced their objection to the variance and testified that it would change the character of the neighborhood. Nevitt Steele, the neighbor of 209 Central Avenue, testified to his opposition to the granting of the variance. He testified it was his opinion that 209 was already in violation and that to grant the variance would put both lots in violation. He also testified that he attended the April, 1988 Land Preservation Meeting, looked at the plans for 207 and voiced no objection at that time. This concluded Protestants testimony in case 89-16-SPHA. The Board will once again reiterate that the foregoing encapsulation is in no way intended to portray the depth and detail of all the testimony which is a part of the case record.

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The Board in this Opinion will first address case 89-396-SPHA (Ronald F. Jones, et ux). From the plethora of testimony and evidence and allegations received some facts can be determined. It was uncontested that somewhere near the turn of the century a building of significant size was erected at 209 Central Avenue. There was uncontradicted testimony that this building was used at that time as a weekend country vacation spot for city residents. In 1941, Mr. and Mrs. Susimehl purchased the two lots and began the conversion of the building on 209 to six apartments. There was testimony that this six apartment use has continued up until the purchase of the site by Mr. Jones. Mrs. Susimehl testified that the lot at 207 did in fact contain an unpaved dirt driveway that was used for automobile access to 209. There was also testimony that parking for several vehicles was provided at the rear of 209. The Protestants claim that the use of this dirt driveway on 207 is vital to the nonconforming use of the property at 209. The Board will not find this so. While it is true that up until Mr. Jones's purchase the two lots were always conveyed as one sale but were always designated as two separate parcels, certainly the owners of an improved and an unimproved lot should be allowed the use of the lot in any incidental way they see fit. If 207 had been used as a garden to provide food for 209 would this then mean that 207 could never be anything but a garden as long as the structure on 209 existed. The use of the dirt driveway was a convenience to the owner of both lots and was an incidental use to the owner since he owned both lots. To rule that this incidental use by an owner perpetuates that use forever in conjunction with the legal

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nonconforming use would appear to this Board to be arbitrary. The Board will further note in this Opinion that when Mr. Jones purchased the property at 209, he applied for and was granted the right to construct a driveway on 209. Mr. Steele, the neighbor at 211, complained because the driveway was to be constructed adjacent to his lot and that parking was to be provided in front of the structure on 209 and, as a result thereof, Mr. Jones relocated the driveway to the other side of the lot and provided the parking in the rear of the lot. There was testimony that during some of the time Aileen Singer owned the site she did not rent one of the first floor apartments but merely opened the connecting door between the two apartments and used them for a time for her own personal use. The Board will note that absolutely no changes were made in this nonrented apartment. It still retained its own meter system, its own kitchen, and its own bathroom. Section 104.1 provides that if a nonconforming use is abandoned or discontinued for a period of one year the right to continue or resume such nonconforming use shall terminate. Since no physical changes whatsoever were made in this nonrented apartment there is no evidence of intent to abandon and since there was no abandonment of this use the right to resume that use must exist.

After consideration of all the testimony and evidence and for all of the above reasons, the Board is of the opinion that the nonconforming use of the property at 209 Central Avenue as a six apartment dwelling should be affirmed and will so order. As to the requested variances on the property at 209 Central Avenue, the Board will note that the structure was built many many years prior

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

RONALD F. JONES and : Case No. 89-396-SPHA
SUZANNE LUSSIER-JONES, : NE/S Central Avenue, 125 SE
Appellants : Glyndon Avenue

APPELLANTS' BRIEF
Statement of Facts

The Appellants, Ronald F. Jones and Suzanne Lussier-Jones (hereinafter referred to as "Jones"), acquired title to property known as 209 Central Avenue, Glyndon, Maryland, on June 24, 1988. The property consists of a lot containing 25,545 square feet of land, more or less, and an existing structure, located in D.R. 2 and D.R. 3.5 zones. (See plats accompanying Appellants' petitions filed herein below). The structure has existed since before 1898. The building located at 209 Central Avenue has been operated as a boarding house and/or apartment house since, at least, the late 1800's.

209 Central Avenue and the adjacent lot known as 207 Central Avenue have been conveyed in one instrument, but as two separate lots, for at least sixty years. In March, 1988, the vacant lot known as 207 Central Avenue was sold by Aileen Singer (hereinafter referred to as "Singer") to the Homestead Group (hereinafter referred to as "Homestead"). 209 Central Avenue was

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subsequently conveyed by Singer to Jones by deed dated June 24, 1988.

(The Zoning Commissioner found that 207 and 209 are and have been two separate lots. Appellants do not dispute that part of the commissioner's decision, but adopt that finding.)

Prior to conveying the vacant lot at 207 Central Avenue to Homestead, Singer relocated a driveway and parking lot which from time to time had been, and was then, situated on 207 Central Avenue and had been used for access to 209 Central Avenue and for parking. Singer obtained a building permit to construct the driveway and parking lot on 209 Central Avenue. (Photographs in evidence show that the construction of the driveway was accomplished by putting down a stone surface. No curb cut was necessary.) She complied with the recommendations and/or requests of the Baltimore County Landmarks Preservation Commission.

Appellants received Citation No. 89-038, Citation for Civil Zoning Violation, dated August 10, 1988, citing a violation of section 101.402; 1b01.1A, the alleged violation being "use of property zoned D.R. 3.5 to commit the following:

Apartment building located on residential property that lacks required lot area and minimum dimensional (width/side yard) standards."

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At trial of that matter, the County Solicitor agreed to enter a "stet.", provided Jones filed the appropriate petitions with the Zoning Commissioner. Jones filed their petition for special hearing and petition for variance. Hearings thereon were held before Zoning Commissioner J. Robert Haines. This appeal is taken from the decision of the Zoning Commissioner denying Jones' petition for special hearing and petition for variance.

Questions Presented

1. Was the hearing date scheduled by the Zoning Commissioner advertised for fifteen (15) days prior thereto so as to comply with the requisite notice provisions of the zoning regulations to properly bring the matter before the Zoning Commissioner and, subsequently, properly before this Board?
2. Does the operation of a six unit apartment building at 209 Central Avenue, Glyndon, Maryland qualify as a nonconforming use?
3. Should Appellants' request for a variance from section 402.1 of the Baltimore County Zoning Code to permit side yard setback of 12.0 feet and 12.6 feet in lieu of required 20 feet for one side and 40 feet and/or 50 feet for the sum of both side yard setbacks and to permit a lot width of 65 feet in lieu

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of the required 90 feet or greater as may be determined be granted?

Argument

1. The hearing date scheduled by the Zoning Commissioner was not advertised for fifteen (15) days prior thereto and hence, did not comply with the requisite notice provisions of the zoning regulations. This matter was not properly before the Zoning Commissioner and, subsequently, this Board is without authority to entertain the matter.

Hearing of Appellants' two petitions was originally scheduled before the Zoning Commissioner for April 4, 1989. Prior to the commencement of that scheduled hearing, Appellants argued that the scheduled hearing was not in compliance with the provisions of Sec. 500.7 B.C.Z.R. which provides, in pertinent part:

"the Zoning Commissioner shall schedule a public hearing for a date not less than 30 days after the petition is accepted for filing". (Emphasis supplied.)

The Zoning Commissioner, noting that the date on the notification that the Jones' petitions were accepted for filing was March 8, 1989, agreed that recited provision had not been met. At that time, April 4, 1989, the Commissioner rescheduled the hearing on Appellants' petitions for April 17, 1989. The property at 209 Central Avenue was then posted with a notice of the new, April 17, 1989 hearing date. Appellants contended then, and continue to contend, that the April 17, 1989 date and posting of the property with notice of that date did not conform with the provision of Sec. 500.7 B.C.Z.R. which provides:

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If the petition related to a specific property, notice of the time and place of the hearing shall be conspicuously posted on the property for a period of at least 15 days before the time of the hearing. (Emphasis supplied.)

Clearly posting the property at 209 Central Avenue on April 4, 1989 with notice of an April 17, 1989 hearing date does not comply with the B.C.Z.R. provision that such notice be posted for a "period of at least 15 days before the time of the hearing". Assuming the notice of the April 17, 1989 was posted on the same date that the Commissioner scheduled that date, i.e. at April 4, 1989, there was not 15 days notice. The hearing on April 17, 1989 was not properly before the Commissioner.

This matter, not properly before the Zoning Commissioner, is, therefore, not within the jurisdiction of this Board. See Cassidy et al. v. County Board of Appeals of Baltimore County et al., 218 Md. 418, 146 A2d 896 (1958). In that case, the Court of Appeals of Maryland reiterated the clear legal principle that "the failure of an administrative official or board to give a proper notice of a hearing, required by law, is fatal to the jurisdiction of the official or the board" (146 A2d 896, at 898). In Cassidy, as here, the issue evolved from hearing before the Zoning Commissioner of Baltimore County, and the subsequent hearing on appeal before the Board of Appeals, both administrative proceedings. (Appellant's reserved this issue in their memorandum to the Commissioner and raised it again prior to the commencement of the hearing before this Board. They have in no way waived the 15 days notice requirement of Sec. 500.7.) The Zoning Commissioner had no jurisdiction to hear

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Appellants' petitions on April 17, 1989 because of the failure to meet the requirements of law for notice of a hearing for a "period of at least 15 days before the time of the hearing". (B.C.Z.R. 500.7) The administrative hearing before the Zoning Commissioner was improper. This Board is therefore without jurisdiction in this matter.

2. The operation of a six unit apartment building at 209 Central Avenue, Glyndon, Maryland is a nonconforming use.

The determination of a nonconforming is essentially two part. First, there must be a finding that a lawful use existed prior to the adoption of zoning regulations. (See Section 101, B.C.Z.R., 1955; Bill No. 18, 1976) Second, it must be shown that that use has continued without interruption or change. (See Section 104, B.C.Z.R., 1955, Bill 18, 1976) Also see McKenry v. Baltimore County, Md., 30 Md.App. 257, 385 A.2d 96 (1978).

January 2, 1945 marks the inception of the Baltimore County zoning regulations. The County Commissioners then adopted a comprehensive set of zoning regulations. McKenry supra, at 98; Kahl v. Cons. Gas El. Lt. & Pwr. Co., 191 Md. 249, 254, 60 A.2d 754 (1948); Calhoun v. County Bd. of Appeals, 262 Md. 265 277 A.2d 589 (1971). Section XI, 1945, B.C.Z.R. first provided for nonconforming uses. On March 30, 1955, the County Commissioners adopted a new set of comprehensive zoning regulations. See McKenry. Section 104 of those regulations dealt with nonconforming uses. Currently, Section 104.1, as adopted on March 15, 1976 by Bill No. 18-76, of the Baltimore County Zoning

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Regulations provides for nonconforming uses. In pertinent part, Section 104.1 provides:

"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. . . ."

The evidence herein patently shows that 209 Central Avenue has been, and continues to be, operated as a multi-family (six unit apartment) dwelling since prior to the adoption of the original Baltimore County Zoning Regulations in January, 1945, without any change from that usage, and without any abandonment or discontinuance. The testimony of Anita Susemihl, Ronald Jones, James Reter, Zelma Ensor, Aileen Singer, Cookie Stone and Colleen Thompson Chance establish that 209 Central Avenue has been a boarding house and/or six unit apartment house for as long as anyone can remember, since, perhaps the 1890's; it has been a six unit apartment building since prior to January, 1945. None of Respondents' witnesses disputed Appellants' evidence that 209 Central Avenue has been operated as a boarding house or multi-family apartment house since well before the inception of zoning regulation for Baltimore County, hence, Appellants submit, the question of the existence of a legal nonconforming use is undisputed and not in issue.

Appellants produced evidence of the existence of six units at 209 Central Avenue since the early 1940's. Anita Susemihl testified that, in 1941, she and Louis Susemihl, her

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late husband, acquired the property (then a boarding house) and converted it to six apartments. (Appellants' introduced photographs taken by Susemihl of 209 Central Avenue in 1941.) Mr. Susemihl did much of the conversion work himself. Mrs. Susemihl is not aware of any requirements for permits for the conversion nor does she remember any inspections being made by any county personnel during the time of the conversion. She was able to recall the names of many of the tenants. She stated that the conversion was undertaken shortly after she and her husband acquired the property and and completed before January, 1945. (She was not certain when the outside and balcony trim were finished but she stated that everything was completed by 1946.) Mrs. Susemihl was able to name several of the then tenants. She further stated that parking was against the side of the building closest to 207 Central Avenue. The driveway was unpaved. 207 Central Avenue was well wooded with many trees and underbrush. Mrs. Susemihl testified that she could think of no other use for the 27 room structure except the continuation of the six unit apartments and was at a loss to understand why the six units were being questioned now.

James Reter testified to the continuance of the six unit apartment building usage from the time of his childhood (he is in his sixties now) to the present time. His family bought a grocery store in Glyndon in 1945 and operated it for years. He remembers delivering grocery orders to various units in 209 in his youth, both in the company of his father and later on his own. He is not aware of any construction by the Susemihls during 1945 or thereafter. He has lived in the area for many years and

is familiar with the property. He owned both 207 and 209 Central Avenue from 1966 until 1968. To his knowledge, the building has contained six apartments since at least 1945. Mr. Reter testified that he had planned to construct a separate resident on 207 Central Avenue and knew of no impediment to that development nor of any potential problem with regard to the operation of 209 Central Avenue as a six unit apartment building. A dirt driveway serviced the properties. The parking area was unpaved.

Zelma Ensor, an area resident and real estate broker, testified that she is and has been familiar with the Glyndon area. The apartment building at 209 Central Avenue has been there for as long as she can remember, at least 60 years. Her wedding reception in 1941 was held on Central Avenue. Her first child was born in 1946 while Mrs. Ensor lived on Central Avenue. Mrs. Ensor has been in 209 Central Avenue as early as the 1940's. It has always been a three story building with a center hall and with an apartment unit on either side of the hall on each floor. She further stated that the property and building was an asset to the community, filled a need and had no negative effect on the community.

Aileen Singer acquired the both 207 and 209 Central Avenue in 1978. She sold 207 to Homestead in March, 1988 and 209 to Jones in June, 1988. 209 Central Avenue contained six apartments, two on each of three floors. During her ownership, each of the six units had its separate gas meter, bath and kitchen. There was a time that she occupied both units on the first floor. That was accomplished by merely opening a door

between the units. No physical or structural changes were made. The first floor still had two gas meters, two bath and kitchen facilities. This did not, Appellants submit, constitute an abandonment or discontinuance of the nonconforming use. See Feldstein v. LaVale Zoning Board, 227 A.2d 713, 246 Md.204 (1967). At most this was a temporary abatement of the six unit use to five units. The maintenance of two separate facilities, temporarily combined, supports a finding of a temporary abatement. There is no clear indication of intention, action or inaction which is mandated to extinguish a nonconforming use. See Feldstein, supra, at 734.

In 1978 /9 Mrs. Singer made inquiries at the Baltimore County Zoning Office concerning 207 and 209 Central Avenue when she considered building a home on 207 Central. She was informed that such development would pose no problem. She made inquiries twice more prior to the sale of the lot at 207 Central Avenue. She learned of no necessity for both lots to remain together. Prior to her relocating the driveway and parking from 207 to 209, Mrs. Singer obtained a permit from Baltimore County and approval of Landmark Preservation. At no time during this process was there an interdiction in connection with the relocation of the driveway along the property line between 207 and 209 or relocation of the parking to the rear of 209 and behind the building. In fact, the parking area was located behind the structure in order to accommodate the neighboring home owners, Nevett and Betsy Steele, who objected to parking on the front of the lot at 209 Central Avenue.

Colleen Thompson Chance, a real estate agent who listed both properties for Mrs. Singer, testified that she made inquiries at the Baltimore County Zoning Office concerning the separation of 207 and 209 Central Avenue and was never told that the lots could not be separate and independent. She made inquiries about the continued use of 209 Central Avenue as a six unit apartment building and concluded that, at worst, a special hearing to recognize the non-conforming use would be necessary. She did not interpret the correspondence presented by Respondents between the Steeles and various community and county groups as anything more than Steeles asserting their opinions. (Nevett Steele, on cross examination by Appellants, could not point to any language which said that the the six units at 209 Central Avenue was illegal.) She testified that she would not have listed 209 as six units if she had firm information to the contrary. Although Nevett and Betsy Steele had indicated their unhappiness with the separation of 207 from 209 Central Avenue, Chance felt that they were unhappy neighbors. She testified that Mr. Steele informed her that he would do anything possible to prevent the separation sales of the two lots and that she interpreted the Steeles' subsequent actions as their efforts to advance their stated crusade. To her, the Steeles seemed to be casting around for any reason to prevent the separate sales to Homestead and Jones and the planned development of 207 Central Avenue and raised new objections each time a prior matter was resolved. She gave little credence to the Steeles' varying demands and positions. Indeed, Mr. Steele himself

testified that he did not "know the strength of his convictions" with regard to the applicable zoning for 209 Central Avenue.

Cookie Stone, the selling agent for 209 Central Avenue testified that she concurred Chance's interpretation of the zoning situation for 209 Central Avenue. She had had a listing earlier for 209 and was aware that it had been six units. She foresaw no problem other than a possible need to show the nonconforming use at a hearing.

Respondents introduced affidavits which they assert show the number of units contained in 209 Central Avenue. None of the affidavits were procured by Appellants or at their direction or by Respondents. There is no evidence that Appellants received the affidavits prior to settlement on 209 Central Avenue. In one instance, the existence of "four or more" units is mentioned, in another, six units. This does not contradict Appellants' position that there have been and are six units. While the remaining affidavits suggest the existence of four or five units, the preponderance of the evidence supports the continued use of the property as a six unit apartment building since prior to the inception of the Baltimore County Zoning Regulations. Mrs. Chance was notified that the nonconforming use could not be obtained by affidavit, but should properly be addressed by appropriate proceedings and hearings before the Zoning Commissioner. She did not believe that the six units at 209 Central Avenue was not a permitted use.

Respondents did not controvert the existence of the boarding house and/or apartment building at 209 Central Avenue before the adoption of the Baltimore County Zoning Regulations, nor did they successfully controvert the continued existence of six units at 209 Central Avenue during the critical period.

Respondents attempted to educe evidence to support their contention that the use of 209 Central Avenue has changed in such a manner to terminate the prior nonconforming use. Appellants urge that the evidence shows that the only changes in the use and operation of 209 Central Avenue since at least 1945 has been the relocation of the driveway and parking lot, from 207 Central Avenue to 209 Central Avenue. Further, applying the guidelines set out in McKemy v. Baltimore County, Maryland, 385 A.2d 96, 39 Md. App. 257 (1978), this is not a showing of any change of the nonconforming use which would terminate the right to continue the nonconforming, six unit apartment use already existing at 209 Central Avenue, since, at least, January 2, 1945.

McKemy, supra, at 104, clearly set forth the criteria to be applied in determining whether or not there has been a change in the use of the property which would serve to break the continued nature of the nonconforming use. These are:

- * (1) to what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use;
- (2) is the current use merely a different manner of utilizing the original non-conforming use or does it constitute a use different in character, nature, and kind;
- (3) does the current use have a substantially different effect upon the neighborhood;

(4) is the current use a 'drastic enlargement or extension' of the original non-conforming use."

Appellants presented large photographs showing 209 Central Avenue as it exists today and a small photograph showing the property when acquired by the Susemihls in 1941. A driveway runs parallel to and along the property line between 207 and 209 Central Avenue. No parking is visible from Central Avenue. The parking lot for 209 Central Avenue is located to the rear of the structure located thereon. The photographs show no change in the structure other than cosmetic improvements.

Evidence shows that the use of 209 Central Avenue as a multi-family dwelling has "changed" since the adoption of zoning regulations, if at all, only in the relocation of the driveway and parking lot on 209 Central Avenue. At various times, testimony indicates the driveway on 207 served both 207 and 209; at various times parking for 209 was on 209 and/or 207. The nonconforming use operating at 209 Central Avenue is the same six unit apartment building that has existed, and been in operation in the same manner, over the period of years predating the enactment of the Baltimore County Zoning Regulations to present. The location of the driveway and parking lot on 209 Central Avenue in no way changes the continuous operation of the six unit apartment building. It does not, in any way, reflect a different nature and purpose of use than existed prior to 1945. The driveway and parking lot are a part of the operation of the six units at 209 Central Avenue, not a new or different usage of the property. Indeed, the testimony of Mrs. Susemihl that 209 was used for parking. The drive way and parking represent no

difference in the basic use of the property. There is nothing about 209 Central Avenue to reflect anything but the nature and purpose of the original nonconforming use.

The current use reflects totally the nature and purpose of the original nonconforming use, a six unit dwelling. The property, as always, is being used as a six unit multi-family dwelling. The fact that the parking for the residents of 209 Central Avenue is now totally on that property and behind the building does not in any way reflect a new usage of the property. Parking and access are normal and established use associated with residents. This does not constitute a usage different in character, nature and kind than that which has long existed, i.e., a six unit multi-family dwelling. Usage has not changed from apartments to office, apartments to commercial or apartments to anything else.

The current use does not have a substantially different effect upon the neighborhood. The density of 209 Central Avenue has not changed since prior to zoning. The building has not changed in size, shape or character since the early 1940's. Its operation as a six unit multi-family dwelling has not changed. The location of the parking lot and driveway on the lot has not substantially changed the effect of the operation of 209 Central Avenue on the community. The operation of the apartment building had not undergone any substantial change since 1945, supporting Appellants position. The parking and driveway are not, Appellants reiterate, a change in the original use. The parking is now to the rear of the building on 209 Central Avenue. Parked vehicles are not visible from Central Avenue by

virtue of the very location of the lot behind the structure. If anything, this effects the community beneficially by limiting the visibility of parked vehicles. The location of both the driveway and the parking lot were approved by the Baltimore County Landmarks Preservation Commission and the work was done in compliance with a permit from Baltimore County. There was no showing of opposition by the community to the application or issuance of the permit.

Opposition to the continued nonconforming use and the granting of the requested variances is best represented by the position of the Glyndon Community Association, Inc. letter dated October 12, 1990 and introduced by Respondents. That letter states, in part:

"[Glyndon residents] 'appreciate the historic flavor of the community and are committed to maintaining and improving the beautiful Victorian houses and large lots on which they are situated. . . . [The Board] has voted unanimously to oppose this appeal until such time as the contiguous lot [207] can once again be used to support the parking lot and driveway requirements for a six unit facility."

Thus, the opposition is not to the nonconforming use of 209 Central Avenue, not to the "maintaining and improving the beautiful Victorian houses", but rather to the separate use of the lot at 207 Central Avenue. The community may well and properly object to what they perceive as the loss of open space at 207 Central Avenue, however the instant appeal of Jones is not the appropriate arena. There is no real showing of community resistance to the continued nonconforming use of 209, rather there is evidence of community dissatisfaction with the loss of the undeveloped lot. The opposition to development of 207 should

consideration in this appeal from decisions affecting the current use of the property is of the original usage. It is permissible so Phillips v. 385 A.2d 410

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to the existing Zoning Regulations and that to deny the side yard variances or the 65 foot lot width in lieu of the required 70 feet would create extreme hardship since the only way this can be accomplished would be to tear the building down. The Board is therefore of the opinion that the requested variances should be granted and will so order.

The Board will next address in this Opinion case 89-16-SPHA (The Homestead Group, Ltd.). The Petition in 89-16-SPHA asks two things, that lot 207 be found an entity totally separate from lot 209 and be unencumbered by any use of 209 and to permit the erection of a building on a 65 foot lot (207) in lieu of the required 70 feet in the D.R.3.5 zoned area of the lot. After consideration of all the testimony and evidence and especially in light of the Board's finding in case 89-396-SPHA that the operation of 209 is a legal nonconforming use and that the two lots have always been separate deeded parcels, the Board will find as a fact that 207 is not encumbered by any use of 209 and is a buildable lot contingent on the granting of a five foot variance from the required 70 foot lot width to 65 feet. The Board of Appeals under Section 307.1 is given the power to grant an area variance where strict compliance with the Zoning Regulations would result in practical difficulty or unreasonable hardship. To deny this five foot variance would transfer a sizeable lot from a usable lot to an unusable lot and in the Board's opinion would result in unreasonable hardship and will therefore grant the requested variance.

Case Nos. 89-16-SPHA (The Homestead Group, Ltd.) and 89-396-SPHA (Ronald F. Jones, et ux) 10

ORDER

It is therefore this 12th day of April, 1991 by the County Board of Appeals of Baltimore County with reference to case 89-396-SPHA (Ronald F. Jones) ORDERED that the structure at 209 Central Avenue is in fact a nonconforming use for six apartments, that the variance to permit a side yard setback of 12 feet zero inches and 12 feet six inches in lieu of the required 20 foot setback for one side and 40 or 50 feet the sum of both sides and to permit a total lot width of 65 feet in lieu of the required 90 feet be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that with reference to case 89-16-SPHA (The Homestead Group, Ltd.) that the property known as 207 Central Avenue be GRANTED the variance to permit construction on a 65 foot lot in lieu of the required 70 feet and that the property at 207 be declared an unencumbered property separate from 209 with the following restriction:

- 1) approval be obtained from the Landmarks Commission as to the format and style of the residence to be constructed so that it is in conformity to the community and not a detriment to the same.

Any appeal from this decision must be made in accordance with Rules B-1 through B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY
William T. Hackett
William T. Hackett, Chairman

Harry E. Buchheister, Jr.
Harry E. Buchheister, Jr.

IN THE MATTER OF THE
THE APPLICATION OF
RONALD F. JONES, ET UX
FOR A SPECIAL HEARING AND
VARIANCE ON PROPERTY LOCATED
ON THE NORTHEAST SIDE OF CENTRAL
AVENUE, 60 FEET SOUTHEAST OF
CLYNDON AVENUE (209 CENTRAL
AVENUE)
4TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* CASE NO. 89-396-SPHA

DISSENTING OPINION

This case comes before the Board as a companion case of 89-16-SPHA (The Homestead Group, Ltd.). It is an appeal from an adverse decision of the Zoning Commissioner of Baltimore County. The Petitioner requests the approval of a multi-family apartment dwelling at 209 Central Avenue as a legal nonconforming use or as an alternative approve the existing improvements and lot pursuant to Baltimore County Zoning Regulations (BCZR) that apply to conversion of dwellings to apartment use. Also requested are several variances.

I agree with the Chairman that much of the testimony was not on point and was alleged testimony, but would add that much testimony was supported to a high degree by lapsed memories and poor judgment. I would disagree with the Chairman as to what anyone believed in this case. It is difficult for me to figure out what Mr. Jones and Mrs. Singer had in mind after being given notice of zoning problems from Mr. Steele, a neighbor and attorney.

As the Chairman did not detail the testimony, I also will let the record speak for itself.

A nonconforming use must be proved by the Petitioner. The County does not have to prove the nonconforming use does not exist.

A nonconforming use can be extinguished if there is a change

Case No. 89-396-SPHA, Ronald F. Jones, et ux
Dissenting Opinion 2

in the use or if the use stops for at least one year. Nonconforming uses are inherently incompatible with uses permitted in a zone. Boyer v. Sembly, 25 Md. App. 43. Nonconforming uses pose a threat to the success of zoning, limit the effectiveness of land controls, imperil the success of community plans and injure property values. The purpose of restrictions on nonconforming uses is to achieve the ultimate elimination of such uses through economic attrition and physical obsolescence. County Council of Prince George's County v. E.L. Gardner, Inc., 293 Md. 259.

There was testimony as to the number of apartments in the building at 209 Central Avenue, that number being four, five or six apartments at various times.

The Zoning Commissioner of Baltimore County did not have testimony from Mrs. Susemihl who was the owner of the property when it was converted to the apartments. Mrs. Susemihl testified from the West Coast over the telephone. Mrs. Susemihl, who owned Lots 207 and 209 during the 1940's, could not conclusively testify that six apartments existed prior to January 2, 1945. She stated that the conversion to apartments was not completed until 1946 or 1947. Mrs. Susemihl also stated that the driveway and parking area for the apartment building were situated on Lot 207.

From additional testimony, it is my opinion that if I were to take a photograph of this use, prior to the sale of 207 Central Avenue, I would have a photograph of a large apartment building to one side of a 130' wide lot known as 209 Central Avenue, and on the other side of this 130' wide lot would be open space and a driveway to a parking pad covered with crusher run, known as 207 Central

Case No. 89-396-SPHA, Ronald F. Jones, et ux
Dissenting Opinion 3

Avenue.

In June of 1988, Ronald F. Jones purchased 209 Central Avenue from Mrs. Singer. If we now take another photograph of the use, we would see a very large apartment building with a driveway to the rear of the apartment building and an unimproved lot on the other 65' lot.

Baltimore County Zoning Regulations set forth the requirement for nonconforming uses. Section 104.1 states in part:

A nonconforming use may continue except as otherwise specifically provided in these regulations provided that upon any change from such nonconforming use to any other use whatsoever, . . . , the right to continue or resume such nonconforming use shall terminate. No nonconforming building or structure and no nonconforming use of a building, structure, or parcel of land shall hereafter be extended more than 25% of the ground floor area of building so used.

In McKeney v. Baltimore County, 39 Md. App. 257, the standard to determine if the present use is within the scope of a nonconforming use:

- 1) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use?
- 2) Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature and kind?
- 3) Does the current use have a substantially different effect upon the neighborhood?
- 4) Is the current use a drastic enlargement or extension of the original nonconforming use?

In order to answer the above four questions let's look and compare the two photographs.

- 1) Clearly there has been a change from the original nonconforming use. A review of two photographs now shows an

Case No. 89-396-SPHA, Ronald F. Jones, et ux
Dissenting Opinion 4

unimproved lot at 207 Central Avenue which is not now supplying area to reduce the overall bulk of the building. In addition, parking areas are now behind 209 Central Avenue.

2) Yes there is a change in the use and that use is different in character, nature and kind. There have been very drastic changes in the use of 207 Central Avenue. The parking area and the supporting open space are not now located at 207 Central Avenue but are now all located on the 209 Central Avenue lot. The total legal density for the two lots is 5 units. Each lot would support 2.8 units. The new higher density that we would be left with if the Petitions are approved would far exceed the density for these lots. The building of the new house at 207 Central Avenue would nearly double the bulk of the lots.

3) Yes the current use has a substantially different effect on the neighborhood. The original use, although both expansive in size and impact, was more in keeping with the general character of the neighborhood. If 209 Central Avenue is granted a nonconforming use as a six apartment building and all of the supporting services that were provided on 207 Central Avenue are shifted to 209 Central Avenue, there will be an overcrowding of the land and a degradation of the large lot, expansive open space, and pleasant landscaping.

- 4) Yes this proposed use is a drastic enlargement or

Case No. 89-396-SPHA, Ronald F. Jones, et ux
Dissenting Opinion 5

extension of the original nonconforming use. The existing structure covers 2,290 square feet of land. The proposed single-family dwelling will cover about 1,600 square feet of land. This is about a 70% increase in the land area used for structures. The BCZR allows only a 25% increase. On the other hand if we take and separate the lots, we find that the supporting services as such shifted to 209 Central Avenue have a drastic enlargement of the density on 209 and reducing what little open space as there may have been on 209.

After reviewing all of the testimony, exhibits, Memoranda, and argument, I find that the use of the property has changed since at least June, 1988.

Therefore, it is my opinion that 209 Central Avenue is an illegal use and not a legal nonconforming use.

It is also my opinion that the Petitioner does not fall within the meaning of the spirit and intent of the BCZR that apply to the conversion of dwellings to apartment use. The issue of granting the variance should be moot at this time.

DATE: April 12, 1991

John G. Disney
John G. Disney

THE
COUNTY BOARD OF APPEALS
BALTIMORE COUNTY
89-396-SPHA

OF LAW

Hearing to approve the
Central Avenue as a legal
hat said lot (209) and
the B.C.Z.R. that apply to
a variance from Section
and 12.6 feet in lieu of
for 50 feet for the sum of
mit a lot width of 65 feet
early described on Peti-
ced, testified and was
following witnesses ap-
Byrne, Herbert Walms, Roy-
Spoon, Keith F. Ronald, Au-
inger and Zelma Knorr.
are represented by G. Scott
& Nevett Steele, Jr.,
M. Jeanne W. Hammond, Terry
Page and Jean Wroe, Gene
Bye, Sam E. Scruggs,

not be a consideration in this appeal from decisions affecting 209 Central Avenue.

Appellants urge that the current use of the property is not a drastic enlargement or extension of the original usage. It is at most a mere intensification and as such is permissible so long as the nature of use, as here, is not changed. Phillips v. Zoning Commissioner of Howard County, 255 Md. 102, 169 A.2d 410 (1961). As the Court recognized in Phillips, the determination of drastic enlargement or extension or mere intensification is to be made of the facts of each case. There is nothing in the instant case to show a change from one nonconforming use to another or a substitution of one nonconforming use for another. The property is still, as ever, a six unit multi-family dwelling. It has not been converted any different usage by the location of the parking lot and driveway serving, and a part of the operations of, the existing nonconforming use. The current usage contemplates only the continuation of that usage, nothing more. Appellants contend there is no evidence upon which to base a finding of drastic enlargement or extension.

3. Appellants' request for a variance from section 402.1 of the Baltimore County Zoning Code to permit side yard setback of 12.0 feet and 12.6 feet in lieu of required 20 feet for one side and 40 feet and/or 50 feet for the sum of both side yard setbacks and to permit a lot width of 65 feet in lieu of the required 80 feet or greater as may be determined should be granted.

The granting of a variance is not properly a popularity contest. Such determination is to be based upon judicial principles and zoning regulations. The proper criteria are:

- a. whether strict compliance with the zoning regulations for Baltimore County result in practical difficulty or unreasonable hardship
- b. whether the granting of a variance will result in substantial injury to public health, safety and general welfare;
- c. whether the granting of the requested variance will be inharmonious with the spirit and intent of applicable zoning regulations; and
- d. whether the hardship complained of, and which is the basis of Appellants request for variances self-inflicted. [B.C.Z.R., 1955; Bills No. 87, 1961; No. 19, 1962; also see, Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965).]

Obviously, if the current side yard setback and lot width requirements are applied to 209 Central Avenue practical difficulty and unreasonable hardship would result. The lot known as 209 Central Avenue exists and the structure, erected thereon in the 1890's exists. To try to squeeze the property and building into the limitations of current zoning requirements would be judicially unfair and physically impossible without the destruction of the building. The building was erected prior to any requirements imposed by zoning and must be allowed to continue in that form. It has not changed. There is no way to stretch the given land to accommodate the present zoning rules and regulations.

The granting of the requested variances will not result in any, much less, substantial injury to public health, safety and general welfare. There was no evidence to support any such injury at the hearing herein. At least one witness, Zelma Ensor, characterized 209 Central Avenue as an asset to the community. Not only is there absence of any such harm, but the granting of such variances merely recognizes the long existing situation with regard to lot size of 209 Central Avenue, the location of the building thereon. The community desires to maintain the Glyndon ambience and characteristics. This, Appellants urge, dictates that the requested and necessary variances be granted to permit the continued existence of the pre-1900 building. The existence and operation of the property are not injurious to the public health, safety or general welfare. There is no change in the density on 209 Central Avenue. The granting of the variance will not add any new demands, nor increase existing demands, on the community or community services.

There was no showing that the granting of the variances sought will be inharmonious with the spirit and intent of applicable zoning regulations. The gist of the zoning regulations for Baltimore County support appropriate use and re-use of large dwellings in residential zones. Even the conversion of the structure, if that were the case, would support the granting of the variances. (Respondents are resolute in their desire to maintain the ambience of the Glyndon area. To grant the necessary variances for 209 Central Avenue is compatible, perhaps even required, to protect the very existence of the

structure at 209 Central Avenue, a part of the ambience and history of Glyndon.)

The facts surrounding 209 Central Avenue clearly reflect that the criteria for granting a variance have been fully met.

Bounds, supra, would deny the granting of a variance, even where otherwise appropriate, if the circumstances requiring the variance have been created by the property owner or a predecessor in title. This, Appellants urge, is not the case in the instant situation.

Clearly the Appellants did nothing to cause the hardship complained of here. The evidence shows that Appellants had entered into a contract with Singer prior to any official notification of any possible zoning violations. (Again, Mr. Steele stated that he was not certain of the strength of his convictions with regard to the zoning applicable to 209 Central. If he, an attorney was not certain, why should lay people, as are the Jones, rely on his impression or position with regard to the zoning?)

The testimony further shows that Appellants had been assured that the property at 209 Central Avenue conformed with zoning regulations by the real estate people involved. The Appellants are not knowledgeable in real estate transactions. Ronald Jones testified that this was the first experience he or his wife had with zoning. The record shows that Jones previous real estate experience was the acquisition and sale of their family residences and the purchase of an Ocean City condominium. He testified that he had conversations with neighbors and was led

to believe that no problem related to the continued operation of the 6 units, but rather with the proposed development of 207 Central Avenue. Appellants believed that the worst case scenario with regard to the zoning of 209 Central Avenue would be a requirement that they "grandfather" the six unit use or show that it had existed before the Zoning Regulations. It was not until the Appellants received a citation dated 8-10-88 that they were given official notice of any potential zoning problem. Jones had conversations with the Steeles which indicated to Jones that the Steeles' objections to 209 Central Avenue related to the location of the driveway and parking, which had been resolved, that Steeles' opposition was to the development of 207 Central Avenue, not to the continued nonconforming use of 209 Central Avenue. Singer had sold the adjoining lot in March, 1988. Between March and June, 1988, Appellants had communications with citizens of the area which led them to believe that 209 Central Avenue met zoning requirements. Jones have no expertise in real estate matters. They may have been naive in their acquisition of 209 Central Avenue, but that does not constitute the self-inflicted hardship referred to in Bounds, supra. Respondents attempt to make some value of the execution of the second contract of sale between Jones and Singer. Mr. Jones repeatedly said that it was upon assurances that the property would be considered a nonconforming use and knowledge of similar situations in the area that he and his wife went through with the purchase of the property.

There is ample evidence that predecessors in title made ample efforts to determine that 209 Central Avenue was a lot independent of and separate from 207 Central Avenue. Singer, who conveyed the property to the Appellants made inquiries of the Baltimore County Zoning office to determine whether 207 and 209 Central Avenue were so connected as to deny their separation. She was informed of no bar to the separate development of 207 Central Avenue nor to the continued operation of 6 units at 209 Central Avenue. She made three separate inquiries at different times. Chance made similar inquiries and reached similar conclusions. Stone concurred with Chance. Appellants submit that none of the correspondence with county offices and personnel which was introduced by Respondents states that six units are not a permitted use of 209 Central Avenue; rather, the correspondence indicates what procedures may be necessary to have the County "grant" a nonconforming use status to 209. James Reiter, who owned both lots in the 1960's, testified that it was his intention to develop and sell 207 Central Avenue and had never known that that would not be possible.

Unlike the situation in Bounds, there was no cavalier delegation of responsibility for obtaining the necessary permits or information. There was no failure to get permits or to inspect the permit that was issued. Singer was granted a permit to construct a parking lot and driveway on 209 Central Avenue and which was to be used in conjunction with the operation of that property as a 6 unit apartment building. She made efforts to assure herself of the viability of the six units at 209

Central Avenue independent of 207 Central Avenue. At the time of settlement on 209 Central Avenue, in June, 1988, some three months after the transfer of 207 Central Avenue to Homestead there were no zoning violations outstanding on that property. It was not until well after Appellants' settlement on the property that they received any notification from any county official of a potential zoning problem. There is nil in this case to support an argument for self-inflicted hardship.

The testimony and evidence supports a finding that there was no self-inflicted hardship; that the granting of the variances will not be contrary to the spirit of the B.C.Z.R. nor result in substantial detriment to the public health, safety and general welfare. The granting will relieve a hardship due to unique circumstances which cannot be alleviated otherwise.

Conclusion

For the reasons stated, the decision of the Zoning Commissioner should be reversed and Appellants' petition for special hearing to recognize the legal, nonconforming use of 209 Central Avenue as a six unit apartment building and petition for

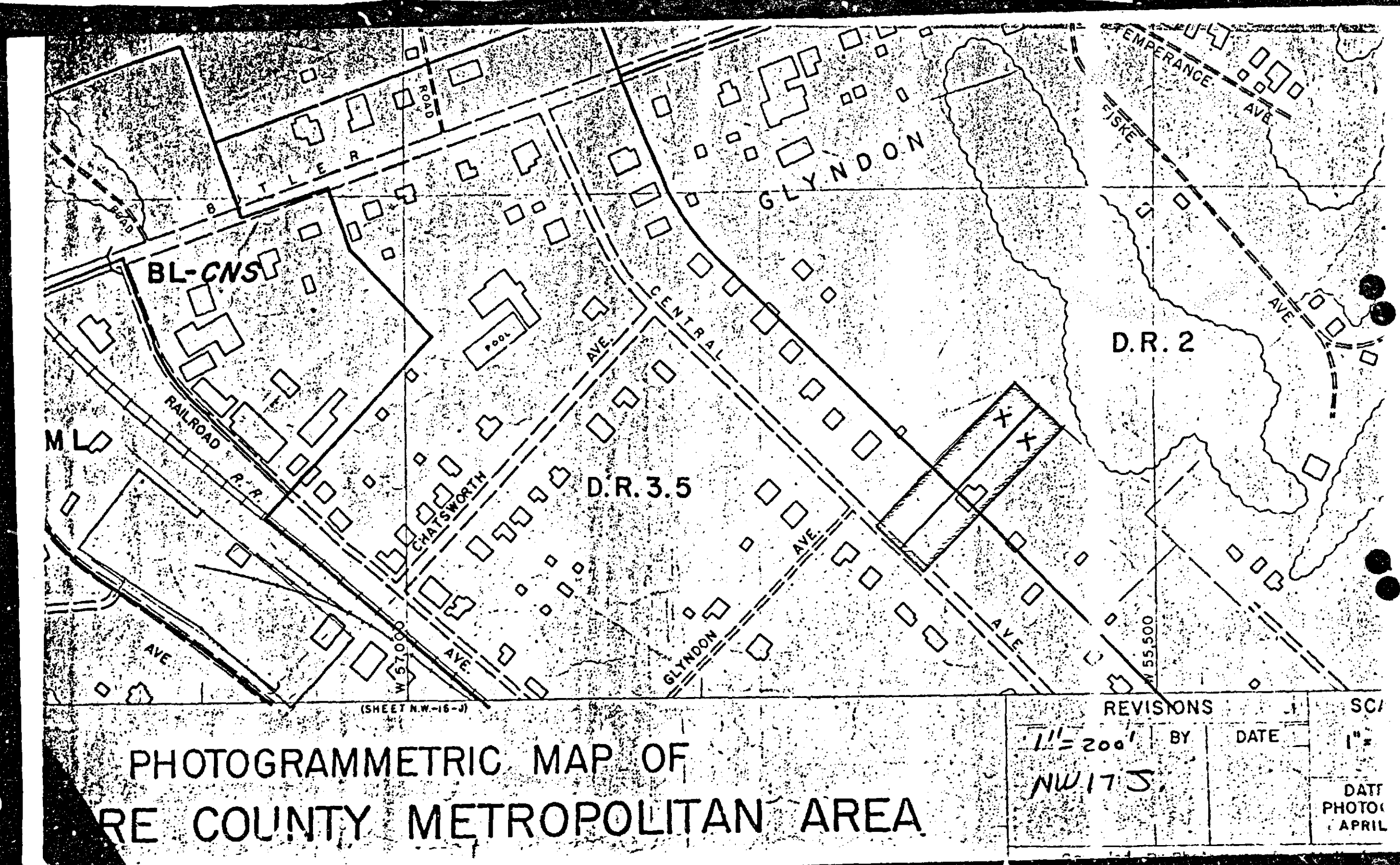
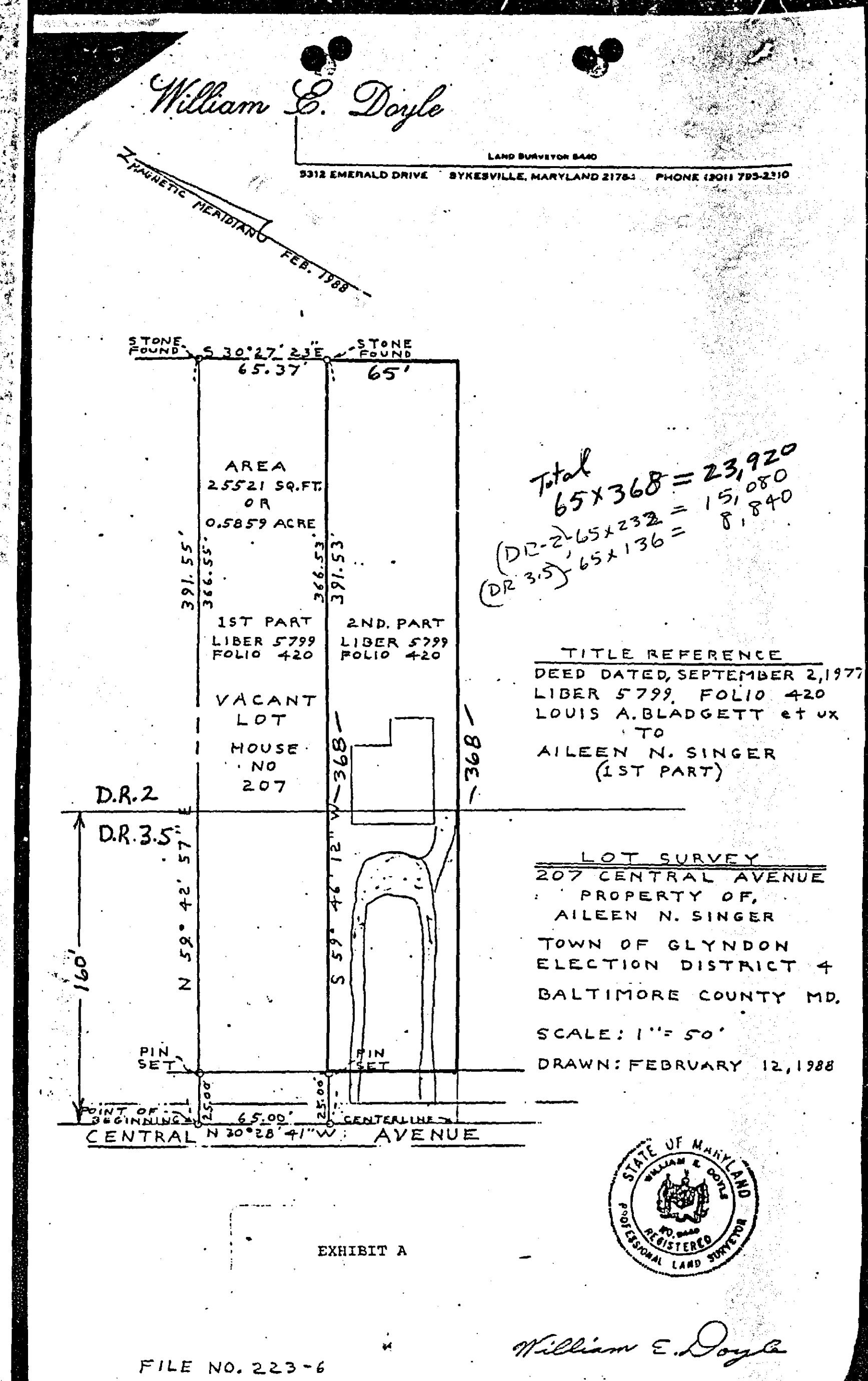
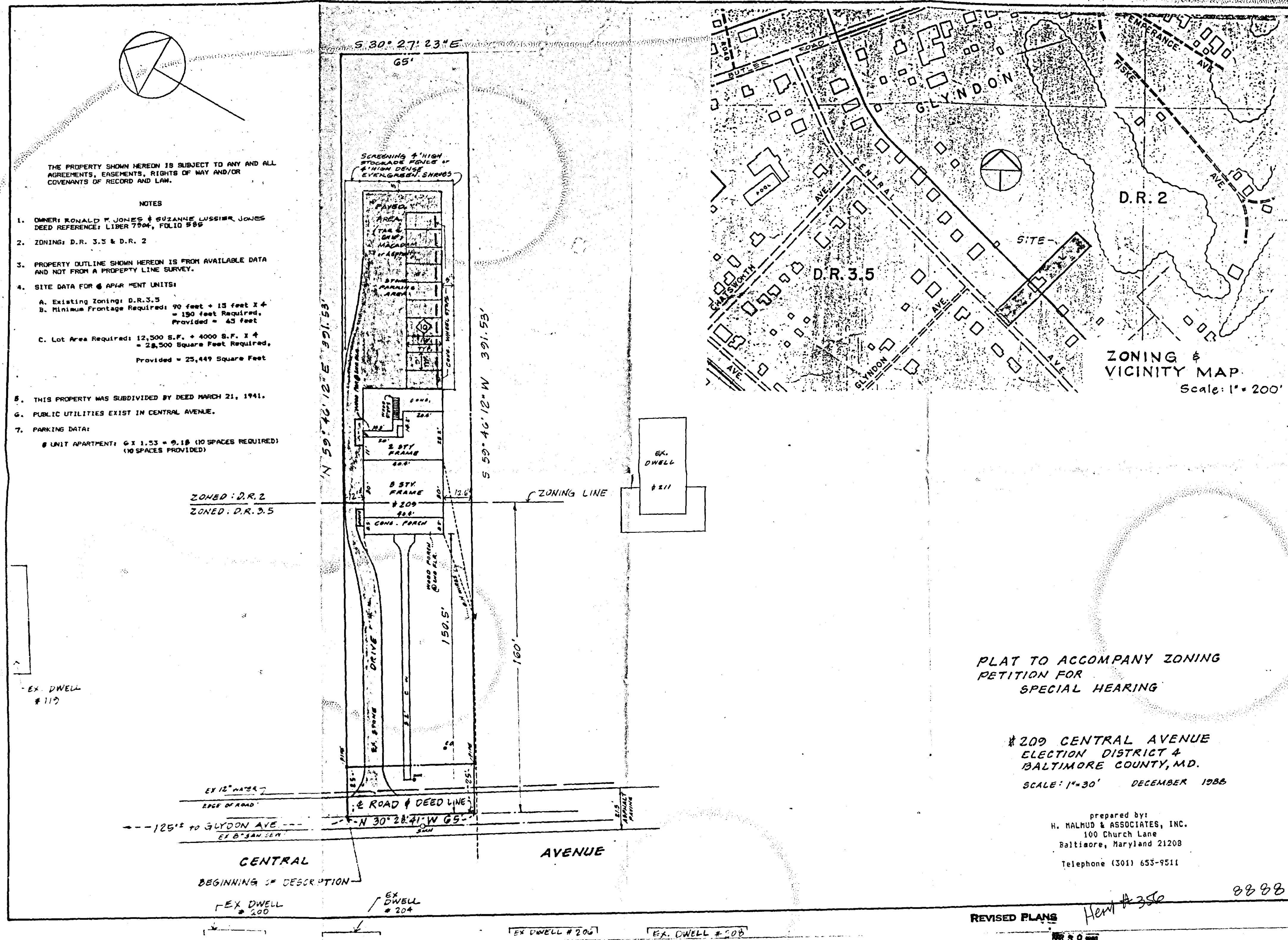
variance should be granted.

Respectfully submitted,

Eleanor J. Lipsitz
ELEANOR J. LIPSITZ
100 Church Lane
Baltimore, Maryland 21208
(301) 484-3050,
Attorney for Appellants

I hereby certify that a copy of the foregoing brief was mailed to Charles B. Heyman, Esquire, 10th Floor, Sun Life Building, 20 South Charles Street, Baltimore, Maryland 21201 and to G. Scott Barhight, Esquire, 300 Lafayette Building, 46 West Chesapeake Avenue, Towson, Maryland 21204, this 22nd day of January, 1991.

Eleanor J. Lipsitz
ELEANOR J. LIPSITZ
Attorney for Appellants



IN RE: PETITIONS FOR SPECIAL HEARING AND ZONING VARIANCE
 209 Central Ave. 60' SE Glyndon Ave. (209 Central Avenue)
 4th Election District
 3rd Councilmanic District
 Ronald F. Jones, et ux
 Petitioners

BEFORE THE
 ZONING COMMISSIONER
 OF BALTIMORE COUNTY
 CASE # 89-396-SPHA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner herein requests a Special Hearing to approve the multi-family apartment dwelling and lot at 209 Central Avenue as a legal nonconforming use for six (6) apartment units or that said lot (209) and improvements conform to the spirit and intent of the B.C.Z.R. that apply to the conversion of dwellings for apartment use; and, a variance from Section 402.1 to permit a side yard setback of 12.0 feet and 12.6 feet in lieu of the required 20 feet for one side and 10 feet and/or 50 feet for the sum of both side yard setbacks and, a variance to permit a lot width of 65 feet in lieu of the required 90 feet, as more particularly described on Petitioners' Exhibit 7 in case No. 89-396-SPHA.

The Petitioner, Ronald F. Jones, appeared, testified and was represented by Eleanor J. Lipsitz, Esquire. The following witnesses appeared on behalf of the Petitioner: Pauline R. Hyman, Herbert Malmud, Registered Land Surveyor, Cookie Stone, Colleen Thompson, Keith E. Ronald, Audrey Fox, James E. Reter, George Singer, Aileen Singer and Zelma Ensor.

The following Protestants appeared and were represented by G. Scott Barhight, Esquire: Doris R. Hammond, Elizabeth B. & Nevett Steele, Jr., Sharon L. Kline, Jane Geipe, Marjorie M. Wilson, Jeanne W. Hammond, Terry Stanley, Martha Clements, Meredith B. Wells, George and Jean Wroe, Gene Bosley, Anna Welsh, Pat Beaver, Vernene Lenz, Kathy Swom, Sam E. Scruggs,

Barbara Whitman, Ann and John M. O'Neill, Donald Wilson, Charles Welsh, Martha Healy, Charles and Mary Broderick, Sharon Herb, Sandy Laken, Nan Kaestner, M. Eugene Bosley, Darlene Scheyer, Marie C. Smith, Carol Wissel and Eleanor Taylor.

During the first hearing concerning case No. 89-16-SPHA, one of the Protestants, Nevett Steele, Jr., Esquire, represented himself and some of his neighbors. Mr. Steele generally presented objections on behalf of those Protestants. Later, the appearance of G. Scott Barhight, Esquire was entered on behalf of both Nevett Steele and all of the above listed Protestants.

The first hearing on this matter was held on April 4, 1989. At that time the Petitioner requested dismissal of this case and/or a postponement, because the hearing was less than 30 days from the date the Petition was received and accepted for filing on March 8, 1989. The hearing was rescheduled for April 17, 1989 to correct the 30 day notice issue.

The Petitioner has not and does not currently accept this corrective action by the Zoning Commissioner. Petitioner, Jones, does not believe he is seeking, because a dismissal would only serve to cause a zoning violation to be brought on these same issues in the Maryland District Court. A postponement to allow the proper time to elapse is the only logical result.

There is no doubt that the Petitioners had notice of the hearings and that the additional thirteen (13) days added to the original twenty-seven (27) days complies with the requirements for notice. The Baltimore County Code, Section 22-26, requires a hearing not less than thirty (30) days after the date the Petition is accepted. The purpose of this law is to provide

vide notice and a chance to prepare and be heard. The Petitioner, clearly, had notice and presented a complete case.

This matter and zoning case #89-16-SPHA have a long and very interdependent history. The evidence, clearly, established that this matter was inter-related with the lot of land known as 207 Central Avenue. I most steadfastly believe that the issues raised by this Petitioner cannot properly be resolved without a review of the two lots, namely, 207 Central Avenue and 209 Central Avenue, concurrently. However, each case will have its own final resolution, decision and Order.

For this reason, I continued the hearing in case No. 89-16-SPHA to allow that Petitioner time to correct their request by filing an additional Petition for Special Hearing. I was also desirous of having the owners of 209 Central Avenue file Petitions for relief concerning the continued use of that property as an apartment house. Finally, I decided that the original and new Petitions for 207 Central Avenue and the relief requested herein for 209 Central Avenue would be heard at the same time as companion cases. Both cases were processed for hearing and the hearings were held on April 17, 1989 and April 28, 1989.

By the very nature of these cases, some of the facts that apply to one case also apply in the other. Likewise, some of the exhibits are marked for one case or another and some are marked for both cases. I will attempt to recount herein only that testimony and evidence necessary to the final resolution of these cases.

In order to establish the basic factual framework, I will reduce the testimony of most of the witnesses to as few printed words as possible.

The following information was provided by the Petitioner, Ronald F. Jones:

The Petitioners, Ronald F. Jones and Suzanne Lussier-Jones, acquired title to property known as 209 Central Avenue, Glyndon, Maryland, the subject of the instant petition for special hearing and petition for variance on June 24, 1988. The property consists of a lot containing 25,545 square feet of land, more or less, and an existing structure, located in D.R. 2 and D.R. 3.5 zones. The structure has existed since approximately 1898. (Petitioners' Exhibit 1 in case No. 89-396-SPHA). A notarized letter from Anita Susemihl (Petitioners' Exhibit 3 in case no. 89-396-SPHA) states that the conversion of the improvements to six (6) apartment units was undertaken after she and her husband acquired title to the property in March, 1941. There was no opportunity to cross-examine this very important witness. That 209 Central Avenue was subsequently conveyed by deed dated June 24, 1988, to Ronald F. Jones and Suzanne Lussier-Jones by deed dated June 24, 1988. Mr. Jones claims he had no knowledge of any problem with the use of 209 Central Avenue as or for an apartment house of six apartments. He states that he was told that Baltimore County authorized the use of the property as an apartment house. He says that the house has always been an apartment house, as far as he knows, and there is no other use of the property.

Testimony was taken from Mrs. Audrey Fox, President of Homestead Group, Ltd. (hereinafter called "Homestead"). Mrs. Fox testified that Homestead is a company engaged in the business of building houses and that it acquired the lot known as 207 Central Avenue for this purpose. Settlement occurred for said the lot on March 29, 1988, pursuant to a contract entered into on January 23, 1988. She stated the lot was represented as a buildable lot by the real estate agent and by the listing agreement. (Petitioner's Exhibit 6 in case 89-16-SPHA) Mrs. Fox said she was aware that

207 Central Avenue was in a historic district and that plans for the dwelling to be erected on said lot had to be approved by the Landmark Preservation Commission ("LPC").

Mrs. Fox claims she went to the Zoning Office to apply for a window variance and, at that time, she was informed that a window variance was not necessary, but that the lot was undersized by 5 feet and that a variance was needed in order to build any house on 207 Central Avenue. An appointment was made to file the Petition for Zoning Variance which led to the original case No. 89-16-SPHA. Homestead continued to process plans for the proposed house, a Victorian style single-family dwelling, before LPC and approval was granted by LPC. (Petitioner's Exhibit 3 in 89-16-SPHA)

Mr. William Kirwin was called as an expert witness on behalf of Homestead and he testified that he has personally viewed 207 Central Avenue, the surrounding properties and neighborhood. That he is familiar with the Glyndon area. With regard to the variance for 207 Central Avenue, Mr. Kirwin testified that the granting of the variance and the development of the property as proposed would not do any substantial injury to the public health, safety or general welfare. In his opinion, there would be no adverse affects from an environmental standpoint. He believes that because the house is a single-family dwelling and there would be no overcrowding of the land; it would not tend to create traffic congestion or have any adverse affects as to air and noise pollution. Further, it was Mr. Kirwin's specific testimony that the variance, if granted, in his view, would not be inconsistent with the zoning or the spirit and intent of the zoning regulations.

Mr. Reter testified for the Petitioner concerning his ownership of 207 and 209 Central Avenue from 1965 to 1968. He also claims he visited the

apartment house during 1946 and 1947. He claims there were six (6) apartments in the house at 209 Central Avenue when he was in the building.

The next witness called on behalf of Homestead was Colleen Thompson, the listing real estate agent. She testified that the lot was listed for sale as a buildable lot and that she personally investigated whether or not it was a buildable lot. Mrs. Thompson claims that she went to the Baltimore County Zoning Office with a copy of a plat and the deeds for 207 and 209 Central Avenue. She claims she advised the Zoning Office of the manner in which both lots were being used, and of the proposal to sell the vacant lot separately from the sale of the lot improved with the apartment building. Mrs. Thompson stated that she was advised that this could be done and there was no problem building on the unimproved lot. Mrs. Thompson further testified that the lot was represented to Homestead as a buildable lot and that at no time prior to or at settlement was Homestead ever advised that there was any question as to whether or not this lot could be improved. Mrs. Thompson further testified that prior to settlement for 207 Central Avenue, she never understood that there was any question with regard to building on that lot. It is her opinion that the only issue raised by the Protestants, as of that time, related to the use of the property known as 209 Central Avenue and, in particular, the number of apartment units that could be occupied on that property and the location of a new driveway on 209 Central Avenue.

Mrs. Thompson could not provide any evidence concerning the information she claims to have received from the Office of Zoning. She did not know who she talked to and she did not obtain written confirmation of the information she received. She also had no explanation about why she did not check her information more closely when she received the letter of

April 8, 1989 from James E. Dyer and W. Carl Richards of the Baltimore County Office of Zoning to Nevett Steele, Jr., indicating there are problems with the lots known as 207-209 Central Avenue. See Protestants' Exhibit 7 in case No. 89-396-SPHA. Likewise, Mrs. Thompson had no answer why she took no action after receiving the April 8, 1988 letter from Mitchell Kellman and James E. Dyer of the Baltimore County Office of Zoning.

Mrs. Aileen Singer, the seller of 207 and 209 Central Avenue, testified that, prior to selling either of said lots, she had consulted the Baltimore County Zoning Office on two occasions regarding the sale of these lots as separate lots and the ability to build on lot 207. Mrs. Singer stated that, after reviewing the zoning maps and the situation with regard to the lots, she was advised that she could apply and obtain a building permit for lot 207. She claims she originally made such investigation because she thought she might want to build her home on the lot known as 207 Central Avenue.

Upon cross examination, Mrs. Singer could not provide any information concerning who she dealt with in the Office of Zoning, nor did she ever present any evidence of any of these meetings. In fact, she was very vague about who she spoke to, what facts were presented and what proof she provided to establish this alleged nonconforming use. It is nearly impossible to judge the legal and factual basis upon which the judgments, that were supposedly rendered granting authority to use the lots as claimed, were made.

Mrs. Singer did not respond to any of the letters written by Mr. Steele concerning her property and the alleged legal problems. In fact, Mrs. Singer does not attempt to justify her lack of action after she admits she received the letters marked Protestants' Exhibits No. 2 and 3 in case No. 89-16-SPHA. Mrs. Singer does not deny that she was aware of the contents of

Protestants' Exhibit No. 7 in case No. 89-396-SPHA addressed to her agent, Mrs. Thompson, and she offered no reason for not informing Homestead of any of these letters and she does not claim to have informed the Jones of any of these letters.

Whether or not Mrs. Thompson and/or Mrs. Singer were, as they claim, told by the Zoning Office that the vacant lot could be developed, is really not controlling of the relief requested herein. It has been established in Maryland, since virtually the advent of zoning, that an impermissible use not only must be denied, but also must be revoked where allowed by mistaken official action. In other words, the doctrine of estoppel does not operate to protect an illegal zoning use from permit revocation. Lipsitz v. Parr, 164 Md. 222, 743 (1933). See e.g., Park Shopping Center v. Lexington Park Theatre Co., 216 Md. 271, 139 A.2d 843 (1958).

Therefore, what they claim they were told is not the issue in light of the fact this is not a violation hearing. No punishment is envisioned in these cases, only the correct enforcement of the regulations. The Zoning Commissioner is not estopped from preventing the possible illegal development of these lots.

Continuing with a review of testimony and evidence, Mr. Herbert Malmud, a Registered Land Surveyor, testified for Petitioner, Ronald Jones. He stated that he believes the apartment house at 209 Central Avenue is a proper use, as provided by the within the B.C.Z.R. in the D.R. 3.5 zone. Mr. Malmud testified that, in his opinion, the single lot known as 209 Central Avenue was large enough to support the density of the six (6) apartments. Mr. Malmud listed certain calculations on Petitioner's Exhibit 7 in case No. 89-396-SPHA which do not make sense in light of the requirements listed in the B.C.Z.R. for the D.R. zone. He made no attempt to ex-

plain his opinion or the basis for his calculations. It appears to me that there is no basis for Mr. Malmud's opinions and he is stating a position in support of a client with no realistic belief that it is true.

Mrs. Zelma Ensor also testified on behalf of Homestead. She is a Real Estate Broker with 31 years of experience in and around the Glyndon area. She is very active in the historic preservation of Glyndon. Mrs. Ensor was of the opinion that the proposed house at 207 Central Avenue would not harm the health, safety, or welfare; that the house was well-planned and, as situated on the lot, would have no adverse effect on the properties in the area, their values or the neighborhood, but, on the contrary, would have a good effect on the area and values of the property.

Mrs. Eleanor Taylor, past President and Member of the Board of Historic Glyndon, Incorporated, testified in opposition. Mrs. Taylor stated that a lot of time and effort was devoted to having Glyndon accepted by the LPC. Mrs. Taylor stated it was a protective measure because the objective of LPC is to try to have structures built that fit in architecturally and with the general appearance of the properties nearby. Mrs. Taylor acknowledged that the dwelling to be erected at 207 Central Avenue had been approved by the LPC and that the LPC would not have approved the plans if it did not feel that it was compatible with the present structures in the neighborhood. With regard to the width of the lot, Mrs. Taylor took the position that if the B.C.Z.R. require certain size lots, there should be no deviation therefrom under any circumstances. Mrs. Taylor basically felt that 207 Central Avenue ought to remain as a vacant lot to support 209 Central Avenue and the big house with all the apartments.

Mrs. Taylor also testified that many of the other small lots in the area are outside the official historical district. She does not believe

the second house on lot 207 Central Avenue is correct and good for the community. She stated that she has been in the house at 209 Central Avenue many times and for years the first floor was used as one apartment, not two. The nonconforming use for six apartments was lost, in her opinion, when the first floor was used as one apartment and not two.

Mr. Donald H. Wilson testified in opposition to all of the relief requested in both cases. He believes the variances requested are improper and will lead to over use of the land. He went on to say that the parking in the area is very bad and the big house on 209 Central Avenue needs the land from both lots to support all the cars, people, dogs and activity.

Mr. Wilson said he thinks the large house on 209 Central Avenue needs the open space of 207 Central Avenue to permit the house to fit into the community. The area of the land is needed to support the area and bulk of the house. These are not separate lots for use purposes. He agreed with the other witnesses that the requirements of the B.C.Z.R. must be strictly enforced. He does not want any variances. Mr. Wilson also acknowledged, however, that he heard Mrs. Taylor's testimony and characterization of LPC and that he knew nothing about the plans and made his comments without any knowledge of what house was contemplated for the lot.

Mrs. Doris Hammond testified as a Protestant and she acknowledged that Historic Glyndon, Incorporated participated in the LPC meetings and that she was present as an observer at the LPC meetings at which the house to be erected on 207 Central Avenue was discussed. Mrs. Hammond voiced opposition to improvements being erected on 207 Central Avenue stating that she thought it ought to remain as a vacant lot as part of the use at 209 Central Avenue.

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Mrs. Hammond stated she has lived across the street from this apartment house at 209 Central Avenue, since 1947. She knows that the first floor has not always been used as two apartments. In fact, when the owners live on site, the first floor was used as one apartment only. The doors between the two areas open up to make one big apartment.

Mrs. Hammond also testified how 207 and 209 Central Avenue have always been used together. She told how the parking and driveway were on the vacant area and how the people used 207 Central Avenue as the yard area. There is no doubt in her mind that the land from both lots have been used over the years to support the activities and needs of all the residents in the apartment building.

Also testifying for the Protestants was Mark Laken, President of Glyndon Community Association. Mr. Laken acknowledged that he saw the plans and felt they were irrelevant. In his mind the issue was that Glyndon has a very special designation given by the United States and Baltimore County and should have a more strict zoning code, but at the very least, there should be no deviation from the strict requirements of the present zoning code. He, therefore, felt that without regard to any impact, if a lot does not comply, it should not be built upon. He agreed that if plans are approved by LPC, this would mean that the type of house is compatible with the Historic District of Glyndon.

One of the main Protestants was Nevett Steele, Esquire, who is also the author of several letters, marked Protestants' Exhibits 2 and 3 collectively in zoning case No. 89-16SPHA. Mr. Steele's testimony, clearly, shows that he was aware of the possible sale of these lots and he did not believe the sale was proper. The exact nature of his complaint and the issues he raised have changed in form and nature over time. However, the un-

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disputed fact is the Singers, the original owners of both 207 and 209 Central Avenue, knew that Mr. Steele questioned the sale of the lots to separate and different owners.

Mr. Steele testified he was concerned that, if various relief requested is permitted, the Victorian quality of the homes in the community will be disturbed. He stated that the purpose of LPC is to make sure the dwellings are compatible with the neighborhood. Mr. Steele testified he was not dissatisfied with the architecture or size of the proposed house, but in essence he feels that the lot at 207 Central Avenue should remain as a vacant lot joined together with 209 Central Avenue and the apartment house use thereon.

Mr. Steele's letter of February 26, 1988, marked Protestants' Exhibit 2 in case No. 89-16-SPHA, clearly raises issue with the proposed sale of the properties at 207 and 209 Central Avenue. In the first paragraph, of the letter, he raises the issue of sale of some area of land for a new house. In the second paragraph, there is a direct reference to the Baltimore County Zoning laws.

It is very interesting that Mr. and Mrs. Singer were also copied on the letters of March 5, 1988 and March 7, 1988 from Mr. Steele to the Baltimore County Zoning Commissioner, but Mrs. Singer found no need to take further action after receiving a copy of these letters. Also, Mrs. Singer received a copy of the March 30, 1988 letter from Mr. Steele to Carl Richards of the Baltimore County Zoning Office. All of these letters are a part of the Protestants' Exhibit 3 in case No. 89-16-SPHA. Mrs. Thompson and Mr. and Mrs. Singer both were mailed a copy of the nonconforming use denial letter from Mitchell Kellman, Zoning Associate, on April 8, 1988 which is marked Protestants' Exhibit 4 in case No. 89-16-SPHA.

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Clearly, the letters from Mr. Steele raise issue with the transfer of the vacant lot and the continuation of the nonconforming apartment house use. In fact, the April 8, 1988 letter to Mrs. Thompson from Mitchell Kellman and later to Mr. Jones relates to approve the alleged six (6) apartment house as a nonconforming use.

Mrs. Singer never denied receiving these letters, nor does she attempt to explain why she did not take positive action to investigate the matter. Her only statements concerning the issues raised in all of these letters about her property was that she believed the letters were about the "other lot". She then returns to her testimony about her visits to the Baltimore County Zoning Office, her handling of these potential problems makes no sense and, her testimony about the whole subject is totally unconvincing. She attempts to hide behind the statements she claims she received from the Zoning Office and then say the letters from Mr. Steele are unimportant.

Neither Mrs. Thompson nor Mrs. Singer offered any explanation why they did not take any action after they received the April 8, 1988 letter, which is marked Protestants Exhibit 4 in case No. 89-16-SPHA. They did not even attempt to inform Homestead, who had just purchased the lot at 207 Central Avenue, nor did they inform the Jones, who would not settle on 209 Central Avenue for another two (2) months.

In fact, Mrs. Singer received a letter of March 25, 1988 from John W. McGrain, (Petitioner's Exhibit No. 6 in case 89-396-SPHA) that approves the parking area for 209 Central Avenue behind the house. Petitioner Jones argues that this letter supports his right to continue to use the six (6) apartments. Of course, neither Mrs. Singer nor Mr. Jones ever followed up on the requirements set out in paragraph No. 3 of that letter. They never

checked to confirm compliance with the "... zoning ordinance of Baltimore County. ...".

Likewise, Mrs. Singer claims she received a permit for the transfer of the parking area (Petitioner's Exhibit No. 5 in case 89-396-SPHA) and the "... County. ...", therefore, approved the six apartment house use. This is an interesting argument, but totally unfounded in either fact or law. The facts are the permit is a grading permit that is not reviewed by the Office of Zoning. Legally, she was referred to Landmarks Preservation Commission, who warned her of her need to comply with zoning in the letter of March 25, 1988. See Petitioner's Exhibit No. 6 in case No. 89-396-SPHA. Mrs. Singer failed to respond to any of the warnings to comply with the B.C.Z.R.

The Petitioners, in both cases, rely heavily upon the testimony of Mrs. Thompson and Mrs. Singer. I understand the Petitioner's desire to have this reliance upon the alleged statements of the Zoning Office carry the weight of persuasion in these cases.

The Petitioner's problem is very simple. Mrs. Singer and Mrs. Thompson, as her agent, did not react in anything close to a reasonable manner. No reasonable person would have ignored the problems raised in all of the letters. Mrs. Thompson and Mrs. Singer very carefully protected Homestead by not informing them of the letters dated February 26, March 5, March 7 and April 8, 1988. In fact, the first three letters were received at least three (3) weeks before the Homestead settlement. It appears Mrs. Singer, also, did not inform Petitioner, Jones, of the problems they had been forewarned of on at least six (6) different occasions and they completed the sale even after they had received official word from Baltimore County that the house was not a nonconforming apartment house.

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There are certain underlying facts which are not in dispute and should be settled at this point. They are:

1. The parcels of land known as 207 and 209 Central Avenue have been for many years separately described lots. This has been true since prior to January 2, 1945.
2. During the time January 2, 1945 through and including March 28, 1988, the lots known as 207 and 209 Central Avenue have always been jointly owned. That 209 Central Avenue has been improved with a large building used as a multi-family dwelling unit for many years.
3. On March 28, 1988, Aileen N. Singer transferred 207 Central Avenue to Homestead Group, Ltd. (Protestant's Exhibit #1).
4. The land known as 207 Central Avenue is an unimproved lot except for the parking area, driveway and open space that, until March 28, 1988, serviced 209 Central Avenue for the past fifty (50) years, or so.
5. The Baltimore County Zoning Regulations (B.C.Z.R.) do not permit a multi-family, six (6) unit, apartment house to be located at 209 Central Avenue.
6. The lot known as 207 Central Avenue is too narrow to permit the construction of a single family home without a variance. All other area and set back requirements can be met by the proposal on Petitioner's Exhibit 4.
7. That Mrs. Singer decided to sell the two lots (207 and 209 Central Avenue) as two separate lots for two different uses and followed through on that decision on March 28, 1988.

The Protestants have argued that the relief requested herein cannot be granted if the two lots, 207 and 209 Central Avenue, are viewed as one parcel required to support the six apartments on 209 Central Avenue. This is

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true in a fashion, but this view of the case will not answer all of the issues before the Zoning Commissioner.

Turning now to the legal decisions before the Zoning Commissioner, the proper place to begin is with the use of these lots prior to January 2, 1945. (The beginning of modern zoning in Baltimore County). All of the decisions concerning these lots are interrelated. There is no one answer to this case, but a series of decisions that begin on January 2, 1945. Therefore, the use of 207 Central Avenue is tied to the use of 209 Central Avenue, as the Protestants argue, but 209 Central Avenue does not totally control the use of 207 Central Avenue, as I will explain herein.

The reason for this format is very simple. When the two cases are viewed together, they raise several issues, namely, an alleged nonconforming use, the possible continuation of that use, after the removal of nearly fifty (50%) percent of the land area for a totally different and unrelated use, and a new single family home. The issue of the alleged nonconforming apartment house must be reviewed first.

The first principal to determine a nonconforming use as outlined in Section 104.1 of the B.C.Z.R. and as applied by McKenny v. Baltimore County, Maryland, 39 Md. App. 257, 385 A2d 96 (1978) is to determine whether or not there was a pre-existing lawful nonconforming use prior to January 2, 1945. This is both a factual decision and a legal decision.

Aileen Singer owned both lots and used them to support the apartment house. In this capacity, she was acting no different than every owner before her for many years. She owned what she believed was a valid apartment house at 209 Central Avenue and a vacant lot at 207 Central Avenue.

Prior to March 29, 1988, 207 and 209 Central Avenue were separately deeded lots, which were owned jointly from at least January 2, 1945. From

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January 2, 1945 until March 29, 1988, 207 Central Avenue was used as a parking lot driveway, open space and yard area for a very large old house known as 209 Central Avenue. It is clear the house at 209 Central Avenue has been an apartment house for many years. When exactly it became an apartment house is somewhat unclear, but the best evidence is that it was an apartment house prior to January 2, 1945. The number of units in the apartment house is debatable. All of the evidence collectively establishes that 207 and 209 Central Avenue have been, for many years, used as one parcel of ground with one use, namely, an apartment house. The lot at 207 Central Avenue has always supported the apartment house.

Now, at first brush, this appears to be a nonconforming use apartment house and ends the review of these cases. The few facts listed above appear to comply with the requirements of Section 104.1, of the B.C.Z.R. for a nonconforming use. Section 104.1 says in pertinent part:

"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, . . . the right to continue or resume such nonconforming use shall terminate. No nonconforming building or structure and no nonconforming use of a building, structure, or parcel of land shall hereafter be extended more than 25% of the ground floor area of buildings so used."

Of course, Petitioner Jones in support of the case for 209 Central Avenue, Case No. 89-396-SPHA, claims the inquiry ends at this point; it does not. That type of review is too simplistic. Likewise, Petitioner, Homestead for 207 Central Avenue claims the separate lot is an individual lot and it is entitled to be used with no connection to the apartment house and 209 Central Avenue. Again, this is a simplistic view of the issues involved and an inappropriate review in this case. This type of review

ignores some of the basic underlying principals of a nonconforming use, namely, that the area incorporated into the actual nonconforming use must be determined; that the area required to support the continuation of an alleged nonconforming use must remain consistent; that the scope of the use must be determined; that the extent of the alleged nonconforming use must be established; and many other factors that must be defined and determined to complete the inquiry.

Continuing with a review of the alleged nonconforming use apartment house, the weight of the evidence has established an apartment house use for 207/209 Central Avenue. This nonconforming use, clearly, rests upon both 207 and 209 Central Avenue. The entire land area must be considered.

As to the issue of the number of units, the maximum claimed is six (6). There is no doubt that the first floor has been used as one apartment, at different points in time. Therefore, there have been lapses in the six (6) apartment use to a maximum of five (5) apartments. These lapses have lasted for several years. The Petitioners, Mr. and Mrs. Jones, in case no. 89-396-SPHA, argue, very fiercely, the point about the number of units.

Petitioner, Jones, argues that their evidence proves six (6) apartments. There are so many holes in this argument that I will not list them all in this opinion. However, a short list includes: no proof of the date of establishment of the six (6) apartments, no evidence at all concerning the years 1951 through 1963, and no evidence concerning continued use during the years 1969 through 1976.

Petitioner, Jones, claims to substantiate his case with the evidence of Mr. Reter and Mrs. Singer. Mr. Reter only testified to having been present in the house at 209 Central Avenue during 1946 and 1947; then,

again, when he owned the building from 1965 through 1968. Mrs. Singer has no knowledge of the use of this property prior to 1976. She can prove nothing about its use during the 1940s, 1950s, 1960s or the early 1970s. This evidence simply does not meet the requirements of Section 104 of the B.C.Z.R. concerning continued use.

There is no debate that the maximum number of units is five (5). There is evidence of a few as three (3) apartments. There is very strong evidence to suggest a reduction to three (3) or four (4) apartments for multi-year periods of time during the 1960s and/or 1970s. However, as I will explain below, the discussion about the number of units is moot and the proof of continued use is incomplete and fails to establish a nonconforming use. Petitioner, Jones, failed to meet his burden of proof for the alleged nonconforming apartment house.

It is important to keep in mind that the burden of proving a nonconforming use rests always with the Petitioner. This burden may not be shifted to the Protestants, as Mr. and Mrs. Jones have attempted to do, nor may it be shifted to Baltimore County, Maryland. The Petitioners claim that the witnesses for the Protestants failed to controvert the existence of the six (6) unit nonconforming apartment house. This is a total misplacement of legal burden by Jones. I will not accept the Petitioner's attempt to shift the burden of disproof upon the Protestants.

By definition, nonconforming uses are inherently incompatible with uses permitted in a zone. Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). Nonconforming uses pose a threat to the success of zoning, limit the effectiveness of land use controls, imperil the success of community plans and injure property values. The purpose of restrictions on

nonconforming uses is to achieve the ultimate elimination of such uses through economic attrition and physical obsolescence.

Clearly, nonconforming uses are disfavored at law and are to be restricted. Furthermore, a nonconforming use is limited to the land on which the activity operates. If the activity is conducted within a building or structure this helps to define the use and to further limit the scope of the nonconforming use.

Petitioner, Jones, failed to prove a basis for the legal establishment of this apartment house as nonconforming use and he failed to prove a history of continuing use of a six (6) unit apartment house. The first principal, required by McKemy, supra, is not met by the weak evidence claimed for the nonconforming apartment house use prior to January 2, 1945 through March 29, 1988. I believe this nonconforming use must fail at this point and must, therefore, be rejected. However, for the purposes of argument, I will review the remaining principals of McKemy, supra, and review the remaining underlying legal principals raised by the parties.

Returning to the review of the nonconforming use, the inquiry now shifts to March 29, 1988 when Mrs. Singer transferred 207 Central Avenue to Homestead, a separate and unrelated buyer, for a distinct, different and unrelated use from the apartment house use at 209 Central Avenue. The inquiry then centers on the issues of change and/or lapses of the alleged nonconforming use.

As stated in McKemy v. Baltimore County, Maryland, 39 Md. App. 257, 385 A.2d 96 (1978), the second principal to be applied, as specified in Section 104.1, is whether or not there has been a change in the use of the subject property. A determination must be made as to whether or not the change is a different use and, therefore, breaks the continued nature of

the nonconforming use. If the change in use is found to be different than the original use, the current use of the property shall not be considered nonconforming.

The first part of this principal is a finding of whether or not there have been changes. I believe there have been changes. First, there has been a very drastic change in the use of 207 Central Avenue which was one-half of the land that always supported the apartment house use. That lot no longer supports the apartment house at 209 Central Avenue. The parking area and supporting open space, and yard space, is not located on 207 Central Avenue to diffuse or spread the apartment house use to a larger land area.

Secondly, the new house to be located at 207 Central Avenue will increase overall density for the total area of the original nonconforming use area which was originally both 207 and 209 Central Avenue.

Clearly, the total legal density for the two lots is five (5) units. Each lot has a separate density of 2.8 units which would only permit two (2) actual units per lot. What the Petitioners, jointly, want to establish on the total area would represent seven (7) density units (6 apartments and one house). There are only six (6) units currently and have been as few as five (5) units as recently as 1985. This new higher density would far exceed the density permitted for these lots, either jointly or severally.

Thirdly, the construction of a new house on 207 Central Avenue will nearly double the bulk of both lots. The new house will change the effect upon the community. The land area covered by improvements will also double. To claim as the Jones do that there is no change when density increases from five (5) to seven (7) units is to live with one's head in the sand. Density must be viewed as one of the hallmark considerations

of impact upon the community. Density is the fundamental basis of residential zoning in Baltimore County. Furthermore, to claim that the additional house with the additional bulk and parking is not a change, is unacceptable. The parking was never before upon 209 Central Avenue.

For all of the reasons listed above, including, but not limited to, the change in density, the change in parking, the loss of open space, the increase in overall density when the new house is built, and the change in special relationship between the old large house on two lots to the community; there is no other finding possible other than a change in use as envisioned by the McKemy, supra, standard. The new uses of the two lots is, clearly, different from the use on the two lots jointly for the past fifty (50) years.

I want to make it very clear that I believe Mrs. Singer had a right to transfer the lots to separate owners. The issue herein is the affect of her decision, not whether she had a right to make the decision to sell the lot. The owner of separately deeded lots has a right to sell them. However, the use of the lots is a zoning issue and will rightfully be determined by the Zoning Commissioner for Baltimore County.

When Mrs. Singer decided to sell 207 Central Avenue as a building lot, she was removing that land area and support services area from the apartment house. She is permitted to undertake this action, however, she is subjected to the consequences of that decision. The consequences of that decision is to change the nonconforming use apartment house into two new uses. One use is the old apartment house on a different land area with additional facilities and accessory uses, and the other use is the new single family house at 207 Central Avenue. Therefore, these new uses break the continuing nature of the alleged nonconforming use and the original

use, therefore, terminates. As held in McKemy, supra; the current use of the property shall not be considered nonconforming.

Now, turning to the final principal of Section 104.1 of the B.C.Z.R., as established in McKemy, supra.

When the claimed nonconforming use has changed, or expanded, then the Zoning Commissioner must determine whether or not the current use represents a permissible intensification of the original use or an actual change from the prior legal use. In order to decide whether or not the current activity is within the scope of the nonconforming use, the Zoning Commissioner should consider the following factors:

"(a) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;

(b) Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature and kind;

(c) Does the current use have a substantially different effect upon the neighborhood;

(d) Is the current use a 'drastic enlargement or extension' of the original nonconforming use?"

A review of these standards, clearly, evidence a change in density. The nature of the current nonconforming apartment house use now has twice the impact upon the land and community. The land area is one-half the original land area. The new use of an apartment house at 209 Central Avenue and a new house at 207 Central Avenue will have a substantially different impact upon the neighborhood. There is no way that the reduction in land area committed to the big house at 209 Central Avenue does not double the impact of that oversized and over density use upon the neighborhood.

Using the factors set forth in McKemy, supra, also indicate that the proposed activity on lots 207 and 209 is not within the scope of the original nonconforming use. The proposed use, as a six (6) unit apartment house and single family dwelling, does not reflect the nature and purpose of the original nonconforming use. The original nonconforming use permitted a very large structure to fit into the ambience and character of Historic Glyndon. The open space created by the landscaped areas of the lot at 207 diminished the impact of the oversized apartment building and provided an architectural scope to the large structure which was more in keeping with the expansive yards and green spaces of Central Avenue.

The proposed use is also a drastic enlargement of the original nonconforming use. The relocation of the parking lot and driveway on to lot 209 and proposed erection of a single family dwelling unit on lot 207 is an expansion, and not a mere intensification of the nonconforming use. See Odell v. City of Eagan, 348 N.W. 2d 792 (Minn.App. 1984), Young v. Board of Zoning Appeals, 307 N.Y.S. 2d 895 (1970), Muse v. Zoning Hearing Board, 415 A. 2d 1255 (Pa. Cmwlth., 1980), Jahnigen v. Staley, 245 Md. 130, 225 A. 2d 277 (1967) and Phillips v. Zoning Commissioner, 225 Md. 102, 169 A.2d 410 (1961).

The inquiry into the nonconforming use now ends with the following conclusions:

- the sale of 207 Central Avenue for a separate and different purpose from the 209 Central Avenue apartment house is proper, acceptable and legal.
- the use of 209 Central Avenue without the support of 207 Central Avenue does not meet the requirements of Section 104 of the B.C.Z.R., as applied by the principals set forth in McKemy, supra, for the continuation of a nonconforming use.

LAW OFFICES
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January 22, 1991

HAND DELIVERED

County Board of Appeals
of Baltimore County
111 W. Chesapeake Avenue, Room 315
Towson, Maryland 21204

RE: Case No. 89-16-SPHA The Homestead Group, Ltd.
207 Central Avenue, Glyndon, Maryland

Gentlemen:

Please file the enclosed original and two copies of Memorandum in the above-entitled case. Copies are being sent to counsel for Ronald F. Jones and counsel for the Protestants.

Sincerely,

Charles B. Heyman
Charles B. Heyman

CBH:rb

cc: Eleanor Lipsitz (w/ Encl.)
Attorney for Ronald F. Jones
Scott Barhight (w/ Encl.)
Counsel for Protestants/Appellants

89-16-SPHA
JUN 26 1990

2/8/90 - Following parties notified of hearing set for Tuesday, February 26, 1990 at 10:00 a.m.:

Eleanor J. Lipsitz, Esquire	Mr. & Mrs. Ronald F. Jones
James E. Reter	Rev. Lloyd Aiken
John W. McGrain	Pauline R. Hyman
Charles B. Heyman, Esquire	Cookie Stone
Audrey Fox	Mr. & Mrs. George Singer
G. Scott Barhight, Esquire	Jean W. Hammond
Doris R. Hammond	Mr. & Mrs. Neve Steele, Jr.
Sharon L. Kline	Jane Geipe
Mr. & Mrs. Donald Wilson	Martha Clements
Meredith B. Wells	Mr. & Mrs. Charles Welsh
Vernene Lenz	Martha Healy
Mr. & Mrs. Charles Broderick	Sharon Herb
Nan Kaestner	M. Eugene Bosley
Darlene Scheyer	Marie C. Smith
Carol Wisel	Mr. & Mrs. Mark Laken
Eleanor Taylor	Patricia A. Waskevich
Elizabeth B. Shule	Linda T. Barr
Robin Smith	People's Counsel
P. David Fields	Pat Keller
J. Robert Haines	Ann M. Nastarowicz
James E. Dyer	W. Carl Richards, Jr.
Docket Clerk - Zoning	Arnold Jablon

7/2/90 - Above parties notified of hearing set for Friday, October 12, 1990 (Day #2) @ 1:00 p.m. and November 9, 1990, Friday (Day #3) @ 10:00 a.m.

10/12/90 - Above parties sent Amended Notice Day #4 October 26, 1990 at 9:00 a.m. and Day #5 November 9, 1990 at 9:00 a.m.

10/26/90 - Notice of Assignment sent to above; correction to date of Z.C. order and also to reverse subject of petitions in each case (shown in reverse on prior Notice).

11/09/90 - Hearing completed; memos due 12/12/90.

12/05/90 - Per telephone conversation w/S. Barhight, deadline for filing memos extended to 1/14/91 w/agreement of counsel; possible settlement; will advise Board Letter sent to all counsel confirming extension. (WTH)

1/11/91 - Per telephone conversation w/S. Barhight, deadline for filing memos extended to 1/22/91 w/agreement of counsel; possible settlement; All parties notified per conference call. WTH acknowledged.

IN THE MATTER OF THE PETITIONS
FOR SPECIAL HEARING AND ZONING
VARIANCE
NES Central Avenue 60' SE
Glyndon Avenue (209 Central
Avenue)
4th Election District
3rd Councilmanic District
Ronald F. Jones, et ux
Petitioners

BEFORE THE
COUNTY BOARD OF APPEALS
FOR BALTIMORE COUNTY
CASE NO. 89-396-SPHA

SUBPOENA DUCES TECUM

Please issue a Subpoena Duces Tecum for the following
witness to appear and testify before the County Board of Appeals
for Baltimore County and to produce the documents listed below
Hearing Room 301, County Office Building, 111 West Chesapeake
Avenue, Towson, Maryland 21204, on behalf of the Protestants
Nevett Steele, Jr., et al, on Friday, October 12, 1990 at
1:00 p.m.

Witness: Corporate Designee
Carroll County Bank and Trust Company
45 W. Main Street
Westminster, Maryland 21157

Documents: Please direct the witness to
produce any and all documents in her
possession or control regarding the sale by
Elizabeth J. Lipsitz and the purchase by Ronald and
Suzanne Lussier-Jones of the property known
as 209 Central Avenue, including but not
limited to all contract documents,
correspondence, title binder, title
commitment, loan documents, settlement
documents and any other writings which relate
to the property at 209 Central Avenue.

G. Scott Barhight
G. Scott Barhight
WHITEFORD, TAYLOR & PRESTON
500 Court Towers
210 West Pennsylvania Avenue
Towson, Maryland 21204

Re: 89-396-SPHA
89-16-SPHA

RECEIVED
COUNTY BOARD OF APPEALS
90 JUN 26 PM 12:59

June 26, 1990
312 Central Ave.
Glyndon, MD 21201

Dear Mr. Buchheister, Mr. Hackett and Mr. Disney,

I apologize for handwriting this letter. Please read it even though it's not typed. Truly, I appreciate your taking the time to consider the reflections of a layman interested in maintaining the integrity of her neighborhood. Let me briefly begin by saying that I'm a maverick - my opinion allies me with the Protestants but with variances.

Historic Glyndon, Inc. and the Glyndon Community Association recently submitted detailed, well-organized guidelines toward the latest Baltimore County Master Plan. We worked long and hard because as you can readily see historic preservation runs afoul of modern development and zoning. Each case for zoning variance, non-conforming use, etc. poses a lethal threat to this architecture and landscape preservation effort we residents cherish, not to mention the investment stability of our properties.

So, legal whatevers aside, here's the practical reality of the situation. Part of this reality doesn't jive with G. Scott Barhight's agreement with Mr. Haines' decision regarding two apartments for Mr. Jones at 209 Central (89-396-SPHA). His property, if you would view it, is obviously an old boarding house, one of three in Glyndon. As a Summer community, at the turn of the century, these boarding houses accommodated

Re: 89-396-SPHA
89-16-SPHA

June 26, 1990

Summer residents escaping the city's heat. Obviously, boarding houses are no longer in vogue, nor is Glyndon only a Summer community. To get to the bottom line, in lieu of seasonal boarders, this 209 Central property has been successfully used as 4-6 apartments since the World War II era. But only with the adjoining lot of 207 Central Ave. which supplied parking and recreation for the residents all those years.

The photo finish of my layperson proposal, which hopefully comes close enough to existing codes and regulations to be viable. Leave Mr. Jones six apartments, maximum, and make him buy the lot of 207 Central. So the property remains as it always has. This solves two problems: 1. Mr. Jones can't financially make it with that big old beast of a building getting rent for only two apartments; and 2. a modern home, semi-old looking, won't be squashed on too small a lot right next to this tall structure.

Not only will this phony old house look squashed in and aesthetically icky, but each newer house built in my neighborhood undermines my property value. The central air, maintenance-free exterior, heat pumps, and other modern conveniences plus the re-sale of my home in a one-down position.

Or my final idea is to make Aileen Singer buy back both properties (allegedly separate lots) and have her re-sell as one unit as it has been. After all she sorta took the zoning codes into her own hands by dividing 207 and 209 in the first place.

Thank you for recognizing my concerns by reading this. Sincerely, Mrs. Sharon Herb



County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180

December 5, 1990

Elizabeth J. Lipsitz, Esquire
100 Church Lane
Baltimore, MD 21208

Charles B. Heyman, Esquire
Sun Life Building, 10th Floor
20 S. Charles Street
Baltimore, MD 21201

G. Scott Barhight, Esquire
WHITEFORD, TAYLOR & PRESTON
210 W. Pennsylvania Avenue, Suite 500
Towson, MD 21204

Re: Case No. 89-16-SPHA /The Homestead Group, Ltd.
Case No. 89-396-SPHA /Ronald F. Jones, et ux

Dear Counsel:

Pursuant to a telephone conversation with Mr. Barhight this date and with agreement of all counsel, the deadline date for filing memorandums in the subject matter with this Board has been extended from December 12, 1990, to January 14, 1991.

Very truly yours,

William T. Hackett
William T. Hackett, Chairman
County Board of Appeals

CERTIFICATE OF MAILING:

Eleanor J. Lipsitz, Esquire
(100 Church Lane, Baltimore,
Maryland 21208)

Charles Heyman, Esquire
(Kaplan, Heyman, Greenberg, Engelman &
Belgrad, Tenth Floor, Sun Life Building,
203 S. Charles Street, Baltimore, MD 21201)

BALTIMORE COUNTY OFFICE OF PLANNING AND ZONING

RONALD F. JONES and : Case No. 89-396-SPHA
SUZANNE LUSSIER-JONES, : NE/S Central Avenue, 125 SE
Petitioners : Glyndon Avenue

APPEAL

MR. ZONING COMMISSIONER:

Please enter an appeal to the Board of Appeals for
Baltimore County in this matter on behalf of Petitioners.

Eleanor J. Lipsitz
ELEANOR J. LIPSITZ,
100 Church Lane
Baltimore, Maryland 21208
(301) 484-3050,
Attorney for Petitioners

I hereby certify that a copy of the foregoing Appeal was mailed, postage prepaid, to People's Counsel, Court House, Towson, Maryland 21204, G. Scott Barhight, Esquire, 300 Lafayette Building, 40 West Chesapeake Avenue, Towson, Maryland 21204, Attorney for Protestants and to Charles B. Heyman, Esquire, 10th Floor, Sun Life Building, 20 South Charles Street, Baltimore, Maryland 21201, Attorney for The Homestead Group, this 21 day of November, 1989.

Eleanor J. Lipsitz
ELEANOR J. LIPSITZ,
Attorney for Petitioners

RECEIVED NOV 21 1989

IN RE: PETITION FOR SPECIAL
HEARING AND ZONING VARIANCES
209 Central Avenue

The Homestead Group, Inc.
Petitioner

IN RE: PETITION FOR SPECIAL
HEARING AND ZONING VARIANCES
209 Central Avenue

Ronald F. Jones and
Suzanne Lussier-Jones
Petitioners

* BEFORE THE COUNTY
* BOARD OF APPEALS
* OF BALTIMORE COUNTY
* Case No. 89-16-SPHA

* BEFORE THE COUNTY
* BOARD OF APPEALS
* OF BALTIMORE COUNTY
* Case No. 89-396-SPHA

PROTESTANTS' MEMORANDUM OF LAW

The Protestants, Nevett Steele, Jr., et al. (the "Protestants"), by their attorneys, G. Scott Barhight and Whiteford, Taylor & Preston, respectfully submit this memorandum regarding the above-captioned matters. This memorandum will set forth the Protestants' position as to each petition filed in both cases.

STATEMENT OF THE CASE

The Petitioners, the Homestead Group, Inc. ("Homestead") (Case No. 89-16-SPHA) and Ronald F. Jones and Suzanne Lussier-Jones (the "Joneses") (Case No. 89-396-SPHA) filed their respective Petitions before the Zoning Commissioner of Baltimore County. The cases were heard at the same time as companion cases. By Orders dated October 24, 1989, the Zoning

Commissioner denied the Petitions for Special Hearing and Variances in Case No. 89-396-SPHA and the Zoning Commissioner granted and denied portions of the Petition for Special Hearing and granted the Zoning Variance in Case No. 89-16-SPHA.

The Protestants appealed the Zoning Commissioner's Order in Case No. 89-16-SPHA to the County Board of Appeals of Baltimore County (the "Board"). The Joneses appealed the Zoning Commissioner's Order in Case No. 89-396 to the Board. After beginning its hearings on both cases in a consolidated fashion, the Board bifurcated the cases, hearing Case No. 89-396 first. The Board requested that the parties file Memorandum to support their respective positions.

A. CASE NO. 89-396, 209 CENTRAL AVENUE

1. Petition for Special Hearing.

The Petitioners in Case No. 89-396-SPHA, the Joneses, have requested that the Zoning Commissioner approve a multifamily apartment dwelling and lot at 209 Central Avenue as a legal nonconforming use for six apartment units. In the alternative, the Joneses' Petition requests that you approve the existing improvements and lot pursuant to the spirit and intent of the Baltimore County Zoning Regulations ("BCZR") that apply to the conversion of dwellings for apartment uses. For the purposes of this memorandum, it is assumed that the unnamed section relating to conversion of dwellings is Section 402.

(a) Nonconforming Use.

The Joneses seek an order approving the existing dwelling on the lot at 209 Central Avenue as a legal nonconforming use for six apartment units. The primary issues in determining whether a legal nonconforming use exists in the instant case are as follows:

(1) Whether Petitioner has met its burden of proof that a six unit apartment has been in existence since January 2, 1945; and

(2) Whether the relocation of the parking lot and driveway previously situated on lots 207 and 209 and the proposed erection of a single family dwelling on lot 207 has so changed the asserted nonconforming use such that it has been terminated.

The burden of proving the existence of a legal nonconforming use is on the Joneses, who lay claim to the use. Calhoun v. County Board of Appeals of Baltimore County, 262 Md. 265, 277 A.2d 589 (1971). By definition, nonconforming uses are inherently incompatible with uses permitted in a zone. Boyer v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). Nonconforming uses pose a threat to the success of zoning, limit the effectiveness of land use controls, imperil the success of community plans and injure property values. The purpose of restrictions on nonconforming uses is to achieve the ultimate elimination of such uses through economic attrition and physical obsolescence. County Council of Prince George's County v. E.L. Gardner, Inc., 293 Md. 259, 443 A.2d 114 (1982). Therefore, nonconforming uses

should not be perpetuated any longer than necessary. Green v. Garrett, 192 Md. 52, 66 A.2d 412 (1949). Further, the spirit and intent of Zoning Regulations is to restrict rather than increase nonconforming uses. Phillips v. Zoning Commissioner, 225 Md. 102, 169 A.2d 410 (1961). As the above cases clearly indicate, the stated public policy is to severely limit nonconforming uses and bring about their eventual elimination.

The Baltimore County Zoning Regulations in Section 104 sets forth the requirements for nonconforming uses. Section 104.1 sets forth in pertinent part:

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, . . . , the right to continue or resume such nonconforming building or structure and no nonconforming use of a building, structure, or parcel of land shall hereafter be extended more than 25% of the ground floor area of buildings so used.

In McKenry v. Baltimore County, 39 Md. App. 257, 385

A.2d 96 (1978), the Court of Appeals set forth the following factors to be considered in determining whether a current activity is within the scope of a nonconforming use:

(1) To what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;

(2) Is the current use merely a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature and kind;

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(3) Does the current use have a substantially different effect upon the neighborhood;

(4) Is the current use a "drastic enlargement or extension" of the original nonconforming use.

An intensification of a nonconforming use is generally permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used. Phillips v. Zoning Commissioner, *supra*. However, an opportunity to intensify a nonconforming use does not confer on a land owner the right to subsequently change or add to that use a new and different one amounting to a drastic enlargement or extension of the prior existing use. Jahnigen v. Staley, 245 Md. 130, 225 A.2d 277 (1967). The general rule is that where there is a change from one nonconforming use to a new and different use, there is an extension of the use. Whereas, the more frequent present use of the property for the same or similar use is a lawful intensification and not an extension. Feldstein v. Javale Zoning Board, 246 Md. 204, 227 A.2d 731 (1967).

In Odell v. City of Eagan, 348 N.W.2d 792 (Minn. App. 1984), the Court of Appeals of Minnesota reviewed a decision by the Eagan City Council denying appellant's application for preliminary plat approval based on the existence of a nonconforming garage. The City Council refused to approve the subdivision of a lot on which a nonconforming garage was situated, saying that the building in question "is currently a nonconforming use and to authorize a split of the lot . . . would cause an expansion of a nonconforming use" *Id.* at 796.

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The Court disagreed with the definition of the garage as a nonconforming use. Instead, based upon the distinctions made in the zoning ordinance between nonconforming structures and uses, the Court determined that the garage was a nonconforming structure and that the failure of the garage to comply with bulk requirements was not a reasonable basis on which to deny the appellant's preliminary plat application. However, the City Council's reasoning does stand for the proposition that subdividing a parcel would cause an expansion rather than an intensification of a nonconforming use.

In Young v. Board of Zoning Appeals, 307 N.Y.S.2d 895 (1970), the Supreme Court of Nassau County reviewed an owner's right to sell off an unimproved portion of a plot of land on which a nonconforming structure was situated. The denial of a variance from rear yard and side wall requirements so that a building may be constructed on unimproved land was held to be improper. The Court reasoned that reduction of the size of the plot on which stands a building nonconforming as to height, setback and the like, does not affect the right to continue the nonconformance, so long as the size of the reduced plot is conforming. In the Young case, unimproved land which did not serve the nonconforming use was permitted to be parcelled off from a plot upon which a nonconforming building was situated, so long as the bulk regulations were met.

In Muse v. Zoning Hearing Board, 415 A.2d 1255 (Pa. Cmwlth., 1980), the Court approved a zoning board's expansion of a country club through the addition of tennis courts. In

Pennsylvania law, structures may be erected on open land previously devoted to a nonconforming use, as a matter of right. The erection of structures upon land not previously so used, may only be accomplished by way of variance. In the Muse case, the Zoning Board approved the expansion of the country club without a variance.

In reviewing the Board's approval, the Muse Court indicated that the threshold question is whether the land on which the country club proposes to locate the tennis courts has been devoted to the country club's nonconforming use. After reviewing the evidence introduced regarding the use of the land in question, the Court agreed that the land upon which the tennis courts were to be erected had been devoted to the country club's nonconforming use. Since it had been properly devoted, the court agreed that the construction of the tennis courts was a natural expansion of the club's activity and should therefore be permitted.

In the instant case, there are a number of undisputed facts which can be identified. Prior to the adoption of Zoning Regulations in Baltimore County, lots 207 and 209 were subdivided pursuant to a recorded plat. Lots 207 and 209 have always been conveyed as one tract, held under the same ownership and transferred by the same deed. Sometime prior to January 2, 1945, a structure was erected on lots 207 and 209. Since 1947, an apartment house consisting of at least four apartment units was

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maintained on lots 207 and 209. Since January 2, 1945 through 1988, a driveway and parking lot serving the building situated on lot 209 has been maintained on lot 207.

The Petitioner's witnesses failed to provide sufficient evidence to support the existence of a nonconforming six unit apartment prior to January 2, 1945. Mrs. Ensor, who had only a passing familiarity with the apartment house testified that there were "at least four" units on the premises.

Mrs. Susemihl, who owned lots 207 and 209 during the 1940's could not conclusively testify that a six unit apartment was in existence by January 2, 1945. In fact, she stated that the conversion into the apartment units was not completed until 1946 or 1947. Mrs. Susemihl also stated that the driveway and parking area for the apartment were situated on lot 207.

The evidence presented before the Board does not conclusively show that an apartment building with six units existed on January 2, 1945. The most likely scenario given the facts presented, is that the house was converted to an apartment house in 1946 or 1947. This conversion was not consistent with the Baltimore County Zoning Regulations and effectively created an illegal apartment use. Since this use is illegal, the Petitioners' request for the Board to determine that a legal nonconforming use exists should be denied.

Assuming, *arguendo*, that the Board finds that a legal nonconforming use existed as of January 2, 1945, this use must be defined. Given the undisputed testimony, it is clear that any nonconforming apartment use included lots 207 and 209. The

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improvements to lot 207 (parking lot and driveway) were devoted to the apartment building situated on lot 209. In fact, the nonconforming use can only be defined as one parcel (lots 207 and 209) with improvements (apartment house, parking lot and driveway).

The erection of a single family dwelling on lot 207 is a change to another use. The nonconforming use encompasses the entire parcel of land. Employing a portion of this parcel for another legal use, a single family dwelling, is in violation of Section 104.1. When there is any change from a nonconforming use to any other use whatsoever, the right to continue or resume such nonconforming use shall terminate.

The factors set forth in McKemy also indicate that the proposed activity on lots 207 and 209 is not within the scope of the original nonconforming use. The proposed use, as a six unit apartment and single family dwelling, does not reflect the nature and purpose of the original nonconforming use. The original nonconforming use permitted a very large structure to fit into the ambience and character of Historic Glyndon. The open space created by the landscaped areas of lot 207 diminished the impact of the oversized apartment building and provided an architectural scope to the large structure which was more in keeping with the expansive front yards and green spaces of Central Avenue.

The proposed use is different in character, nature and kind from the original nonconforming use. The original use was a single structure containing between four and six apartment units. The proposed use shall include the addition of a use permitted as

a matter of right in a wholly new structure. The character of the parcel will change dramatically in that the land area dedicated to buildings will increase by almost two fold. The parking and driveway access previously situated on lot 207 is now cramped onto lot 209. Two driveway accesses are now required where only one was needed previously. The additional driveway access chops up the expansive lawn area which was consistent with the historic ambience and especially open character of the community.

The proposed use will have a substantially different effect upon the neighborhood. The original use, although expansive in size and impact, when placed in the context of the total parcel, was more in keeping with the general character of the neighborhood. If the proposed single family dwelling is permitted on lot 207, there will be an overcrowding of the land and a degradation of the large lot, expansive open space, and a pleasant landscaping and lawns previously associated with this portion of Central Avenue. Additionally, if all of the relief requested is granted, it will serve to encourage other owners to sell off adjacent "double lots," create additional variance requests, overcrowd Historic Glyndon and lead to the disintegration of the character of the community.

The proposed use is also a drastic enlargement or extension of the original nonconforming use. The relocation of the parking lot and driveway to lot 209 and proposed erection of a single family dwelling on lot 207 are an expansion, and not a mere intensification of the nonconforming use. See Odell v. City

of Eagen, Young v. Board of Zoning Appeals, Muse v. Zoning Hearing Board, Jahnigen v. Staley, and Phillips v. Zoning Commissioner, supra.

The footprint of the existing apartment dwelling, including the front porch, equals 2,290 square feet. The footprint of the proposed single family dwelling is approximately 1,640 square feet. This represents a greater than 70 percent increase in the land area committed to structures. Section 104.1 only permits an extension of up to 25 percent of the ground floor area of buildings so used. This 70 percent extension of the ground floor area of the apartment building is clearly in violation of Section 104.1 and a drastic enlargement or extension of the original nonconforming use. After reviewing the factors set forth in McKemy, it is clear that the proposed uses are not within the scope of the original nonconforming use. As such, the Board should deny the Petition for Special Hearing to approve a multifamily apartment dwelling and lot at 209 Central Avenue as a legal nonconforming use for six apartment units.

In his very well reasoned opinion below, the Zoning Commissioner denied the nonconforming use because (1) there has been a very drastic change in the use of lot 207, which was one-half of the land that always supported the apartment house use, (2) the new house on lot 207 will increase overall density for the total area of the original nonconforming use area which was originally both lots 207 and 209, and (3) the construction of a new house on lot 207 will nearly double the bulk of both lots.

Given the analysis required by McKemy, the Zoning Commissioner held that approval of the proposed nonconforming use would have a substantially different impact upon the neighborhood.

(b) Conversion of Dwellings Pursuant to Section 402.

Section 402 permits the conversion of dwellings for residential uses. The dimensional requirements are set forth in a conversion table found on Page 4-3, BCZR. Protestants' Exhibits 6A and 6B are two letters which address, among other things, the application of Section 402 to the instant case. One letter, Exhibit 6B, is from Messrs. Kellman and Dyer of the Office of Planning and Zoning to Ms. Coleen Thompson, Realtor for the Singers in the sale of lot 209 to the Joneses. Exhibit 6A is a letter from Messrs. Richards and Dyer to Mr. Steele. Both letters analyze the conversion of the existing improvements on lot 209 pursuant to the tables contained in Section 402. The conclusion reached by the zoning office is that only two units are allowed under County law. The Zoning Commissioner's Order below confirms this conclusion.

The evidence clearly shows that only two apartment units are permitted pursuant to Section 402. The Petition for Special Hearing seeking approval for the existing improvements as being in compliance with Section 402 must be denied.

2. Petition for Zoning Variance (209)

The Petition for Zoning Variance seeks relief from the side yard and lot width requirements of the Zoning Regulations. Section 307 sets forth the test for the granting of any variance from the bulk regulations. Such variances should be granted only

in cases where strict compliance with the Zoning Regulations would result in practical difficulty or unreasonable hardship. Furthermore, any such variance should be granted only if in strict harmony with the spirit and intent of the bulk regulations, and only in such manner as to grant relief without substantial injury to public health, safety and general welfare.

The need sufficient to justify a variance must be substantial and urgent and not merely for the Petitioners' convenience. McLean v. Soley, 270 Md. 208, 310 A.2d 783 (1973). A petitioner seeking a variance must exercise proper diligence in ascertaining zoning requirements prior to acquiring property in order to avoid a resultant hardship. If such diligence is not exercised, the hardship is self-created and the variance may be properly refused. Wilson v. Mayor and Commissioners of Town of Elkton, 35 Md. App. 417, 371 A.2d 443 (1977). If the grant of a variance would effect the aesthetic ambience of the residences in the immediate area, such variance would be in disharmony with the spirit and intent of the Zoning Regulations. Dahl v. County Board of Appeals of Baltimore County, 258 Md. 157, 265 A.2d 227 (1970). The mere fact that a variance, if granted, would make the property more profitable is not a sufficient ground to justify the relaxation of bulk requirements. Easter v. Mayor and City Council of Baltimore, 195 Md. 395, 73 A.2d 491 (1950).

If the peculiar circumstances which render property incapable of meeting the zoning requirements have themselves been caused or created by the property owner or his predecessor in title, the essential basis of a variance is lacking. An act on

the part of the property owner or his predecessor which has physically so affected the property as to create a unique circumstance or which in itself created either a practical difficulty or hardship in conforming to the restrictions of the Zoning Regulations bars relief. Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965).

The undisputed testimony indicates that the Joneses went to settlement on June 24, 1988. Prior to settlement, Mr. Steele conversed with the Joneses and their counsel regarding potential zoning violations surrounding the proposed uses for lots 207 and 209. Protestants' Exhibit 7 is a letter sent to the Joneses' counsel prior to their settlement confirming the existence of these issues and concerns. Most importantly, the second contract of sale, dated May 28, 1988, contains language showing that the Joneses were well aware of the zoning problems and assumed the risk that these problems created. The record is so filled with examples of notice to the Joneses' predecessor in title, the Singers, and the knowledge of the Joneses, it is unnecessary to reiterate them in this memorandum. See Protestant's Exhibits 1-8, 10, 17 and 18. Suffice it to say that the Singers and the Joneses were well aware of the potential zoning problems associated with their proposed uses of lots 207 and 209 prior to the respective settlements for lots 207 and 209.

The variances requested must be denied based upon the doctrine of self-inflicted hardship. Had the Singers or the Joneses acted with reasonable diligence regarding lot 209, they would have either obtained written confirmation from the zoning

office that the proposed use of lot 209 as a six unit apartment was consistent with the Zoning Regulations or had filed the appropriate petitions to confirm compliance. At best, the realtor for the Singers received oral information from a zoning technician the exact substance and basis for which is clearly in question. The Petitioner did not act diligently and inflicted the hardship from which it seeks relief upon himself and, therefore, the variances requested must be denied.

Assuming, arguendo, that the Petitioner is not barred by the doctrine of self-inflicted hardship, the record contains grossly insufficient evidence to support the requirements of Section 307. The Petitioner, who clearly has the burden of proving practical difficulty or unreasonable hardship pursuant to the Zoning Regulations, has failed to offer any substantial evidence in support of its Petition for Zoning Variance. Since the Petitioner has failed to meet its burden under Section 307, the Petitions for Zoning Variance must be denied.

B. CASE NO. 89-16-SPHA, 207 CENTRAL AVENUE

1. Petition For Special Hearing.

The Petitioner, the Homestead Group, Inc., has filed a Petition for Special Hearing requesting the Board to approve the "unimproved" lot at 207 Central Avenue as a building lot separate, apart and unencumbered by the adjoining lot and improvements at 209 Central Avenue. Whether the relief requested by this petition can be granted is inextricably tied to the

Board's decision regarding the Joneses' Petition for Special Hearing and the issues surrounding the definition of the nonconforming apartment use.

If the Board determines that the nonconforming apartment use includes both of the lots and all improvements, then lot 207 may not be improved by a single family dwelling unless the nonconforming apartment use is terminated. If the nonconforming apartment use is permitted to exist on lot 207 without benefit of the improvements on lot 209, then the Petition for Special Hearing may be granted provided all other sections of the Zoning Regulations have been met.

It is important to note that the Petition for Special Hearing asserts that the lot at 207 Central Avenue is "unimproved." The uncontradicted testimony in the record is that lot 207 has been improved by a driveway and parking lot which has served the building on lot 209 since at least the early 1940's. This factual misrepresentation in the petition should be sufficient to require a denial of the petition filed. If the Petitioner would like to seek relief, it should file a new petition for special hearing which accurately describes the relief requested.

The Protestants are not opposed to the continued use of lots 207 and 209 as a nonconforming apartment use. The focus of the Protestants' concerns relate to the improvement of lot 207 with a single family dwelling in addition to a six unit apartment on lot 209. If the relief requested in the Petition for Special Hearing is granted, then the nonconforming apartment use must be

terminating apartment 207 and 209. The requirements the test for regulations. So where strict compliance in practical difficulty any such variance with the

terminated. If the relief requested is denied, then the apartment building may be able to continue its operation on lots 207 and 209.

2. Petition For Zoning Variance.

The Homestead Group seeks relief from the lot width requirements of the Zoning Regulations. Section 307 sets forth the test for the granting of any variance from the bulk regulations. Such variances should be granted only in cases where strict compliance with the Zoning Regulations would result in practical difficulty or unreasonable hardship. Furthermore, any such variance should be granted only if in strict harmony with the spirit and intent of the bulk regulations, and only in such manner as to grant relief without substantial injury to public health, safety and general welfare.

The need sufficient to justify a variance must be substantial and urgent and not merely for the Petitioners' convenience. McLean v. Soley, 270 Md. 208, 310 A.2d 783 (1973). A petitioner seeking a variance must exercise proper diligence in ascertaining zoning requirements prior to acquiring property in order to avoid a resultant hardship. If such diligence is not exercised, the hardship is self-created and the variance may be properly refused. Wilson v. Mayor and Commissioners of Town of Elkton, 35 Md. App. 417, 371 A.2d 443 (1977). If the grant of a variance would effect the aesthetic ambience of the residences in the immediate area, such variance would be in disharmony with the spirit and intent of the Zoning Regulations. Dahl v. County Board of Appeals of Baltimore County, 258 Md. 157, 265 A.2d 227

(1970). The mere fact that a variance, if granted, would make the property more profitable is not a sufficient ground to justify the relaxation of bulk requirements. Easter v. Mayor and City Council of Baltimore, 195 Md. 395, 73 A.2d 491 (1950).

If the peculiar circumstances which render property incapable of meeting the zoning requirements have themselves been caused or created by the property owner or his predecessor in title, the essential basis of a variance is lacking. An act on the part of the property owner or his predecessor which has physically affected the property as to create a unique circumstance or which in itself created either a practical difficulty or hardship in conforming to the restrictions of the Zoning Regulations bars relief. Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965).

The Homestead's petition for variance must fail, due to the doctrine of self-inflicted hardship. The doctrine applies not only because of the actions of the Singers (the Homestead's predecessor in title) but also because of the actions of Homestead.

Homestead settled on lot 207 on March 28, 1988. Prior to settlement, Mr. Steele put Homestead's predecessor on notice that there were numerous zoning problems associated with their proposed actions of selling lots 207 and 209 separately, of constructing a new dwelling on lot 207 and of continuing to operate an apartment house on lot 209. See Protestant's Exhibits

1-3. The third sentence of the second paragraph of Protestant's Exhibit 1 specifically refers to violating the zoning requirements by constructing a dwelling on lot 207.

Prior to the settlement on March 28, 1988, the Singers had sufficient lands to construct a single family home without the need of any variances. Selling lot 207, without altering the lot lines so that a variance would not be necessary, inflicted the hardship upon themselves. The lot width required could have been accomplished by resubdividing the property. However, the Singers greed blinded them to the problems and they sold lot 207 as a "buildable" lot, ignoring the lot width requirements and Mr. Steele's warnings.

Notwithstanding the unconscionable actions of the Singers, Homestead also failed to act diligently. Ms. Fox admitted that she failed to independently investigate the need for any variances on lot 207, as she had done on every other lot she has purchased. A simple letter to the Zoning Office would have confirmed that a variance was required for lot width. Ms. Fox claims that had she known a variance was required, she would not have purchased lot 207. However, she did not know a variance was required because she chose to accept the flimsy representations of the Singers and failed to take any steps to confirm the need for a variance on her own.

Ms. Fox's failure to investigate the need for a variance is in violation of the requirements of Wilson v. Elkton. A petitioner seeking a variance must exercise proper diligence in ascertaining zoning requirements prior to acquiring property in

order to avoid a resultant hardship. Ms. Fox caused her own hardship. If she had contacted the Zoning Office or a competent zoning attorney, as she had done in every other purchase, she would have been warned of the variance. According to Ms. Fox, she would not have then purchased lot 207 and she would be free of the hardship that she has imposed upon herself.

Before the Zoning Commissioner, Homestead claimed relief under Section 304 of the Zoning Regulations. Section 304 permits the erection of a single family dwelling on an undersized lot provided the following requirements are met:

A. That such lot shall have been duly recorded either by deed or in a validly approved subdivision prior to adoption of these Regulations; and

B. That all other requirements of the height and area regulations are complied with; and

C. That the owner of the lot does not own sufficient adjoining land to conform substantially to the width and area requirements.

The previous debate surrounding this issue concerned bad faith and/or whether adjoining land is available. Section 304 does not apply because sufficient adjoining land was owned by Mrs. Singer prior to the sale to Homestead.

Section 304.C has clearly not been met. The Singers, prior to the sale of lot 207 to the Homestead Group, did own substantial adjoining land which would permit substantial conformance to the width and area requirements of the Zoning Regulations. RM-15 and RM-16 of the Zoning Policy Manual provide guidance as to the requirements of Section 304 and 307. The six

year rule described in RM-16, when applied to the current case, clearly shows that Section 304.C has not been met. Therefore, a variance is required pursuant to Section 307 from the lot width requirements of Section 1802.3.c.1.

CONCLUSIONS

The Singers and both Petitioners have created a situation where the neighborhood is being asked to suffer for their lack of diligence, mistakes and greed. The Petitioners want the Board to ignore the self-inflicted nature of their hardship and provide the relief requested. However, to do so would require that the Board also ignore the substantial harm to the welfare of the Glyndon community.

The Joneses have failed to meet their burden, as they also filed before the Zoning Commissioner, to prove the existence of a nonconforming six unit apartment. There is insufficient evidence to show that a six unit apartment existed prior to January 2, 1945. Further, the loss of lot 207 has so drastically altered the apartment use that any nonconforming status has been terminated.

As all of the Protestants who testified indicated, the construction of a single family home on lot 207 would dramatically impact the character and ambience of their historic community. The erection of a single family dwelling on lot 207 will overcrowd the land, conflict with the character and ambience of Central Avenue and dramatically reduce the open space which has provided a proper setting for the imposing apartment structure. It is unfair to the Glyndon community and

inconsistent with the requirements of Maryland case law regarding variances to grant the relief requested. The Singers and the Homestead have created a hardship and are now before you asking that their self-inflicted hardship be lifted from their shoulders and placed on the backs of the residents of Historic Glyndon. Requiring the neighborhood to bear the burden of the Homestead's lack of diligence would not be an act of justice. It will only reinforce the irresponsible behavior of the Singers and the Petitioners.

Respectfully submitted,

G. Scott Barhight

GSB:sb
cc: Nevett Steele, Jr., Esquire
Charles B. Heyman, Esquire
Eleanor J. Lipsitz, Esquire

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 857-3180
July 2, 1990
NOTICE OF ASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE UNLESS IN FULL COMPLIANCE WITH RULE 2(c), COUNTY COUNCIL BILL NO. 59-79.

CASE NO. 89-16-SFHA THE HOMESTEAD GROUP, LTD.
AND SFH-to improve unimproved lot; VAR-lot width
10/24/89 - Z.C.'s Order GRANTING in part; DENYING in part
CASE NO. 89-396-SFHA RONALD F. JONES, ET UX
SFH-nonconforming use apts.;
(Day Nos. 2 and VAR-setbacks & lot widths
3 from 6/26/90) 10/25/89 - Z.C.'s Order DENYING Petitions
NE/s Central Avenue, 60' SE of Glyndon Avenue
(207 & 209 Central Avenue, respectively)
4th Election District; 3rd Councilmanic District

ASSIGNED FOR: FRIDAY, OCTOBER 12, 1990 at 1:00 p.m. and
FRIDAY, NOVEMBER 9, 1990 at 10:00 a.m.

cc: Eleanor J. Lipsitz, Esquire Counsel for Mr. and Mrs. Jones
Charles B. Heyman, Esquire Counsel for The Homestead Group, Ltd.
G. Scott Barhight, Esquire Counsel for Protestants/Appellants
Audrey Fox, President - The Homestead Group, Ltd.
Mr. and Mrs. Ronald F. Jones
Mr. & Mrs. Nevett Steele, Jr.
Mr. & Mrs. Mark Loken
Ms. Sharon Kline
Terry Stanley
Mr. Eugene Bosley
Ms. Kathy Swen
Ms. Barbara Whitman
Ms. Darlene Scheyer
Ms. Carol Wissel
Ms. Sharon Haro
Ms. Doris Hammond
Ms. Jane Geipe
Mr. & Mrs. Don Wilson
Ms. Jean Hammond
Mr. & Mrs. Mark Clements
Mr. & Mrs. George Wroe
Mr. & Mrs. Charles Welsh
Ms. Verlene Lenz
Ms. Martha Healy
Ms. Eleanor Taylor
Ms. Nan Kaestner
Meredith B. Wells
Mr. & Mrs. John O'Neill
Mr. & Mrs. Charles Broderick
Ms. Marie C. Smith
Ms. Pauline R. Hyman
Ms. Cookie Stone
Mr. James E. Peter
Mr. & Mrs. George Singer
Rev. Lloyd Aiken
Mr. John W. McGrain
Ms. Patricia Maskevich
Ms. Elizabeth B. Shule
Ms. Linda T. Barr
Ms. Robin Smith
F. David Fields
Fat Keller
J. Robert Haines
Ann M. Katarowicz
James E. Dyer
W. Carl Richards, Jr.
Docket Clerk - Zoning
Arnold Jablon, County Attorney
LindaLee M. Kusznau
Legal Secretary

D.B.H.

Signature _____
 Maryland Historical Trust
 Inventory Number _____
 PETITIONER'S
 99-396594A

84 GRIFFITH HOUSE - Before 1898 - 11 Central Avenue. Shown in atlas of 1898-1915 as the J.J. Williams house. Small, low 1-2 storey frame and clapboard cottage in Victorian style with gable roof and stone foundation. Decorated with bargeboards. Owner: John J. Griffin.

PROTESTANT'S
EXHIBIT 2 89-7165PH

**PETITIONER'S
EXHIBIT** 3 89-3965PHA

PROTESTANT'S
EXHIBIT 11 *g*

PETITIONER'S

April 3, 198

Approving such changes could be seen as establishing precedent which could severely inhibit our ability to maintain that unique combination of history and tradition that is Glyndon.

Dear Mr. Haines:

The community of Glyndon is justifiably proud of our

lovely Victorian houses located on spacious lots on small, tree lined streets. Because of these features, Glyndon has been

placed on the National Register of Historic Places and has the honor of being named as the very first historic district in all of the United States. This location of historic and beauty has

of Baltimore County. This combination of history and beauty has attracted a very special type of home owner to Glyndon. People seeking a wonderful hunting home in Glyndon appreciate the

who live or consider buying homes in Glyndon appreciate the historic flavor of the community and are committed to maintaining this one of the beautiful Victorian houses and large lots on

and improving the beautiful victorian houses and large lots on which they are situated.

Central Avenue is the main residential street in Glendon and contains many of the historic Victorian homes that

Glyndon and contains many of the historic Victorian homes that have helped to make Glyndon special. The property in question is located right in the midst of many of Glyndon's most beautiful

located right in the midst of many of Sighaon's most beautiful and historic properties.

The Board of Directors of the Glyndon Community Association has voted unanimously to oppose all of these proposed

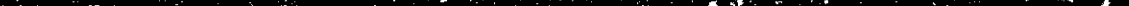
changes. The variances being requested would have a significantly negative impact on the nature of our community and

the scale of residences and lots on Central Avenue.

Approving such changes could be seen as establishing precedent which could severely inhibit our ability to maintain

that unique combination of history and tradition that is Glyndon.

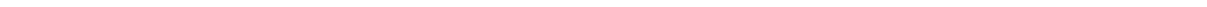
100



... ..

100

SEBASTIAN MARCOTTE INSTALL DRIVEWAY AND PARKING LOT PRIOR TO SETTLEMENT.





GLYNDON

COMMUNITY ASSOCIATION, INC. GLYNDON, MARYLAND 21071

October 12, 1990

Baltimore County Board of Appeals
County Office Building Room 315
Towson, Md 21204

Re: Case Number 89-396-SPHA

Dear Board:

The community of Glyndon is justifiably proud of our lovely Victorian houses located on spacious lots on small, tree lined streets. Because of these features, Glyndon has been placed on the National Register of Historic Places and has the honor of being ranked as the very first historic district in all of Baltimore County. This combination of history and beauty has attracted a very special type of home owner to Glyndon. People who live or consider buying homes in Glyndon appreciate the historic flavor of the community and are committed to maintaining and improving the beautiful Victorian houses and large lots on which they are situated.

Central Avenue is the main residential street in Glyndon and contains many of the historic Victorian homes that have helped to make Glyndon special. The property in question is located right in the midst of many of Glyndon's most beautiful and historic properties.

The Board of Directors of the Glyndon Community Association has once again been used to support the parking lot and driveway requirements for a six unit facility. The appeal being requested would have a significantly negative impact on the nature of our community and the scale of residences and lots on Central Avenue.

We urge you to support the dedicated and tireless work of hundreds of Glyndon residents and deny this appeal.

Sincerely,

GLYNDON COMMUNITY ASSOCIATION

Mark Laken
Mark Laken
President

Duly resolved by the Board of Directors on October 11, 1990.

Mark Laken
Mark Laken
President

Darlene Scheyer
Secretary

LEVIN, GANN & HANKIN

Mr. & Mrs. George Singer, Sr.
Page 2
April 4, 1988

nonconforming use, as you would not likely be able to obtain a "conversion" to five dwelling units with the remaining lot size. It is unclear however, what effect both the outconveyance of 207 Central Avenue and the zoning line that bisects the lot will have on the conversion calculation and should this become a dispute, these may be possible avenues to resolution of the larger problem.

In any event, from what you have told me about your current disputes and differences, I suspect that an amicable resolution will likely be possible. Should you have any further questions or should I need be of any assistance to you, please do not hesitate to give me a call.

Stuart D. Kaplow

SDK/tbm

W. LEE THOMAS, P.A.
ATTORNEY AT LAW
SUITE 204
406 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
TELEPHONE (301) 294-6777

May 10, 1988

Mr. William E. Doyle
5312 Emerald Drive
Sykesville, MD 21784

Re: Aileen M. Singer, 207 Central Avenue
Your File: No. 223-6

Dear Mr. Doyle:

This office represents Mrs. Singer in her effort to establish a non-conforming use at the above-referenced property.

In order to file a Petition for Special Hearing with the Office of the Zoning Commissioner for Baltimore County, I shall need a plat. I understand that you have already prepared one, which certainly can serve as a start.

As you may know, however, Baltimore County requires certain specific information on each plat. A copy of their checklist is enclosed for your reference.

In addition to the information set forth therein, I would also request that you include the following information on the plat:

- 1) location of new driveway and parking lot on 209 Central Avenue;
- 2) location and description of existing trees, shrubs and other screening on south property line; and
- 3) location of dwelling and screening on adjacent property (211 Central Avenue) owned by Mr. Steele, the primary opponent to Mrs. Singer.

I would appreciate your prompt attention to this matter so that I may file the petition at the earliest possible date. Should you have any questions or if I may be of any assistance, please do not hesitate to contact me.

Historic Glyndon Incorporated
Glyndon, Maryland 21071
October 23, 1990

Mr. J. Robert Haines
Zoning Commissioner of Baltimore County
Office of Planning and Zoning
111 W. Chesapeake Avenue
Towson, MD 21204

Dear Mr. Haines,

The board members of Historic Glyndon Inc. would like to express opposition to the granting of variances in case numbers 89-16-SPHA and 89-396-SPHA. We feel that allowing these changes would set an undesirable precedent for the future in the Glyndon Historic District.

The importance of maintaining the historic integrity of our houses and properties in spirit and in fact is not taken lightly by those of us who have chosen to live here and should be recognized by our appointed and elected officials as well. Adding new homes to the community is not at issue but we feel in this instance the changes allowed by the proposed variances could encourage developers to seek out similar properties and further variances. A community of once stately homes and spacious lawns could be chopped into small lots of unsuitable dimensions.

National, State and County designations have been put in place in Glyndon to afford some protection for its unique character and we feel that local boards and commissions should do everything in their power to uphold the laws which grant these designations.

We hope for your much needed and appreciated support by not granting these variances.

Sincerely,

Ann B. O'Neill
Ann B. O'Neill, President
Historic Glyndon, Inc.

To Whom It May Concern:

Historic Glyndon Incorporated is an historic organization of 141 members. The territorial boundary of Historic Glyndon Incorporated, as stated in the by-laws, "shall be the community known as Glyndon, Maryland which shall be deemed to contain the areas known as "Emory Grove" and "St. Georges" and which shall be deemed to contain the property known as the "Sacred Heart Catholic Church on Sacred Heart Lane, Glyndon, Maryland."

The Board of Directors is authorized by the by-laws of the Corporation to conduct all business, including items related to zoning issues. The Board has resolved that Mrs. Eleanor Taylor is authorized to present our views with respect to cases 89-16-SPHA and 89-396-SPHA.

Sincerely,

Ann B. O'Neill
Mrs. Ann B. O'Neill, President
Lynne Maher
Mrs. Lynne Maher, Secretary

RONALD F. JONES, ET UX
NE/s Central Ave., 60' SE Glyndon
Ave. (209 Central Ave.)

#89-396-SPHA
4th Election District
3rd Councilmanic District

Petition filed by Eleanor J. Lipsitz, Esquire on behalf of Ronald F. Jones, et ux for a Special Hearing to approve the multi-family apartment dwelling and lot at 209 Central Avenue as a legal nonconforming use for six apartment units or that said lot (209) and improvements conform to the spirit and intent of the BCZR that apply to the conversion of dwellings for apartment use.

Petition filed by Eleanor J. Lipsitz, Esquire on behalf of Ronald F. Jones, et ux for Variances to permit side yard setbacks of 12 ft. and 12.6 ft. in lieu of the required 20 ft. for one side and 40 ft. and/or 50 ft. for the sum of both side yard setbacks. Also to permit a lot width of 65 ft. in lieu of the required 90 ft. or greater as may be determined.

March 15, 1989 Comments of Baltimore County Zoning Plans Advisory Committee.

March 17 Publication in newspaper.

March 17 Certificate of Posting of property.

April 4 Hearing held on Petition by the Zoning Commissioner.

June 2 Petitioner's Brief filed by Eleanor J. Lipsitz, Esquire.

Protestants' Memorandum of Law filed by G. Scott Barhight, Esquire.

October 24 Order of the Zoning Commissioner DENYING Petitions for Special Hearing and Variances.

November 21 Notice of Appeal received from Eleanor J. Lipsitz, Esquire on behalf of Petitioner.

June 26, 1990 Hearing before the Board of Appeals.

July 24 Continued Hearing before the Board of Appeals (telephone testimony).

October 12 Continued Hearing before the Board of Appeals.

October 26 Concluded Hearing before the Board of Appeals.

LAW OFFICES
LEVIN, GANN & HANKIN

A PROFESSIONAL ASSOCIATION
305 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
301-321-0600
FAX 301-296-2501

April 4, 1988

Mr. & Mrs. George Singer, Sr.
209 Central Avenue
Glyndon, Maryland 21071

Re: 207 and 209 Central Avenue

Dear George and Aileen:

I thought that I would drop you a quick note to confirm our telephone conversation of the other day with respect to a possible zoning violation for a multiple family dwelling use of 209 Central Avenue.

As we discussed, such a utilization of the property would be a "nonconforming use" under the current zoning regulations, however, it may continue as a legal use, if it meets the requirements of Section 104.1 of those regulations. While I am not familiar with the details of your current difficulties, it appears clear that the outconveyance of 207 Central Avenue has served to exacerbate the situation.

While I am unclear as to the nature of the Zoning Office's current involvement with this matter, I can only assume that it was as a result of someone attempting to obtain a certificate of zoning compliance incident to your contract to sell the property. It is extremely unlikely that the involvement was as a result of a citizen complaint because such a complaint would have been referred to the local zoning inspector, Mr. Robin Clarke and not to Carl Richards. In any event, as you likely have a settlement date for your contract, all efforts should be made to resolve this matter informally and with due haste, (before any written responses are promulgated by the Zoning Office), as hearings before the Zoning Commissioner are now being scheduled some four months from now and violation hearings before the District Court are now being scheduled almost five months from now.

Assuming that your current difficulties are in securing a certificate of zoning compliance, you may be faced with the prospect of having the Zoning Commissioner validate your

RONALD F. JONES, ET UX
NE/s Central Ave., 60' SE Glyndon
Ave. (209 Central Ave.)

#89-396-SPHA
4th Election District
3rd Councilmanic District

January 22, 1991 Appellants' Brief filed by Eleanor J. Lipsitz, Esquire.

January 22 Protestants' Memorandum of Law filed by G. Scott Barhight, Esquire.

April 12 Opinion and Order of the Board GRANTING the Petitions for Special Hearing for nonconforming use and for requested Variances.

April 12 Dissenting Opinion by John G. Disney.

May 13 Order for Appeal filed in the Circuit Court for Baltimore County by Nevett Steele, Jr., et ux.
Petition to accompany appeal filed in the Circuit Court for Baltimore County by Nevett Steele, Jr., et ux.

May 14 Certificate of Notice sent to interested parties.

May 22, 1991 Transcript of testimony; Record of Proceedings filed in Circuit Court for Baltimore County.
Notice of Dismissal of appeal filed in CCR, Edo by Nevett Steele, Jr., Plaintiff/Appellant.

May 30 Above Notice of Dismissal stamped and filed by Clerk of the Court.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

IN THE MATTER OF THE
THE APPLICATION OF
RONALD F. JONES, ET UX
FOR A SPECIAL HEARING AND
VARIANCE ON PROPERTY LOCATED
ON THE NORTHEAST SIDE OF
CENTRAL AVENUE, 60 FEET
SOUTHEAST OF GLYNDON AVENUE
(209 CENTRAL AVENUE
4TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT

BEFORE THE
COUNTY BOARD OF APPEALS
OF
BALTIMORE COUNTY

CASE NO. 89-396-SPHA
91 CG 2061
94/90

NOTICE OF DISMISSAL

MADAM CLERK:
Please dismiss the above case pursuant to Maryland 2-506.
This case is an appeal filed pursuant to Md. Rules B-13,
Administrative Agencies.

Respectfully submitted,

Nevett Steele, Jr.
211 Central Avenue
Glyndon, MD 21071
(301) 296-8164 (Work)
(301) 833-6564 (Home)

Elizabeth B. Steele
211 Central Avenue
Glyndon, MD 21071
(301) 833-6564 (Home)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of May, 1991, a copy
of the foregoing Order for Appeal was mailed to Eleanor J.

CERTIFICATE OF POSTING
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

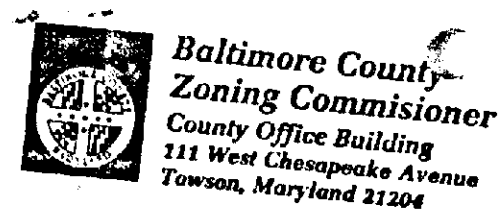
District: 4-4
Date of Posting: 4/5/89
Posted for: Special Hearing & Zoning Variance
Petitioner: Ronald F. Jones, et ux
Location of property: NE/S Central Avenue, 125' SE Glyndon Ave.
(309 Central Avenue)
Location of Sign: Front yard of subject property
Remarks: 89-396-SPHA
Posted by: [Signature]
Number of Signs: 2

CERTIFICATE OF POSTING
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

District: 4-4
Date of Posting: 3-17-89
Posted for: Special Hearing & Zoning Variance
Petitioner: Ronald F. Jones, et ux
Location of property: NE/S Central Avenue, 125' SE Glyndon Ave.
(309 Central Avenue)
Location of Sign: Front yard of subject property
Remarks: 89-396-SPHA
Posted by: [Signature]
Number of Signs: 2

Lipsitz, Esquire, 100 Church Lane, Baltimore, Maryland 21208;
Charles B. Heyman, Esquire, Kaplan, Heyman, Greenberg, Engleman &
Belgrad, P.A., Tenth Floor, Sun Life Bldg., 20 S. Charles Street,
Baltimore, MD 21201; and Linda Kuszmil, Board of Appeals, 111 W.
Chesapeake Avenue, Towson, Maryland 21204.

Nevett Steele, Jr.



Date: 5/1/91
COPIES: 200 PHOTOCOPIES
QTY: 49
PRICE: \$1.00
TOTAL: \$49.00

Account: R-001-6150
Number: 49.00

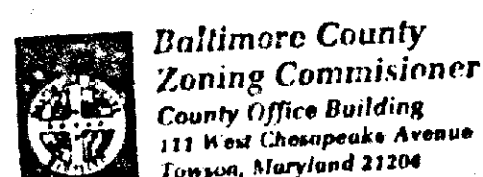
BALTIMORE COUNTY OFFICE OF PLANNING AND ZONING

RONALD F. JONES and
SUZANNE LUSBIER-JONES,
Petitioners
Case No. 89-396-SPHA
NE/S Central Avenue, 125 SE
Glyndon Avenue

APPEAL

MR. ZONING COMMISSIONER:
Please enter an appeal to the Board of Appeals for
Baltimore County in this matter on behalf of Petitioners.

Eleanor J. Lipsitz
100 Church Lane
Baltimore, Maryland 21208
(301) 484-3050,
Attorney for Petitioners



Date: 5/1/91
COPIES: 200 PHOTOCOPIES
QTY: 49
PRICE: \$1.00
TOTAL: \$49.00

Account: R-001-6150
Number: 49.00

CIRCUIT COURT FOR BALTIMORE COUNTY
CIVIL GENERAL

DOCKET 94 PAGE 90 CASE NO. 91CG2061 CATEGORY APPEAL

ATTORNEYS

IN THE MATTER OF THE
THE APPLICATION OF
RONALD F. JONES, ET UX
FOR A SPECIAL HEARING AND
VARIANCE ON PROPERTY LOCATED ON THE NORTHEAST SIDE OF
CENTRAL AVENUE, 60 FEET
SOUTHEAST OF GLYNDON AVENUE
(209 CENTRAL AVENUE
4TH ELECTION DISTRICT
3RD COUNCILMANIC DISTRICT

Nevett Steele, Jr.
Elizabeth B. Steele
211 Central Ave, Glyndon 21071
296-8164, 833 6564

COSTS

- (1) May 13, 1991 - Order from Appeal from the Opinion and Order of the
Baltimore County Board of Appeals fd. (89-396-SPHA)
(2) May 14, 1991 - Certificate of notice, fd.

PAID - RETURNED TO SENDER

MAY 30 1991

DISMISSED WITHOUT PREJUDICE
DATE OF PLAINTIFF'S ATTY. FD.

CERTIFICATE OF PUBLICATION

TOWSON, MD., March 17, 1989

THIS IS TO CERTIFY, that the annexed advertisement was
published in THE JEFFERSONIAN, a weekly newspaper published
in Towson, Baltimore County, Md., once in each of 1 successive
weeks, the first publication appearing on March 16, 1989.

THE JEFFERSONIAN.

S. Zake Orlan
Publisher

PO 10818
reg M 27075
price \$97.30

CERTIFICATE OF PUBLICATION

TOWSON, MD., March 16, 1989

THIS IS TO CERTIFY, that the annexed advertisement was
published in the OWINGS MILLS TIMES, a weekly newspaper
printed and published in Towson, Baltimore County, Md., appear-
ing on March 16, 1989.

OWINGS MILLS TIMES.

S. Zake Orlan
Publisher

PO 10818
reg M 27075
price 97.30

Baltimore County
Zoning Commissioner
Office of Planning & Zoning
Towson, Maryland 21204
494-3353

Date: 3/20/89



Dennis F. Rasmussen
County Executive

Mr. & Mrs. Ronald F. Jones
312 Church Road
Reisterstown, Maryland 21136

Re: Petition for Special Hearing and Zoning Variance
CASE NUMBER: 89-396-SPHA
NE/S Central Avenue, 125' SE Glyndon Avenue
(209 Central Avenue)
4th Election District - 3rd Councilmanic
District
Petitioner(s): Ronald F. Jones, et ux
HEARING SCHEDULED: TUESDAY, APRIL 4, 1989 at 9:00 a.m.

Dear Mr. & Mrs. Jones:

Please be advised that \$127.32 is due for advertising and posting of
the above-referenced property. All fees must be paid prior to the hearing.
Do not remove the sign and post set(s) from the property from the time
it is posted by this office until the day of the hearing itself.

THIS FEE MUST BE PAID AND THE ZONING SIGN(S) AND POST(S) RETURNED
ON THE DAY OF THE HEARING OR THE ORDER SHALL NOT BE ISSUED.

Baltimore County, Maryland and bring
to the County Office, County Office
minutes before

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT
No. 097568

DATE: 4/4/89 ACCOUNT: 801-115-000
AMOUNT: 127.32

RECEIVED FROM: [Signature]
FOR: [Signature] 89-396-SPHA

B 810****127522** 2048F
VALIDATION OR SIGNATURE OF CASHIER
FILE

CC1 Eleanor J. Lipsitz, Esq.
File

Baltimore County
Fire Department
Towson, Maryland 21204-2586
494-4300
Paul H. Reincke
Chief

J. Robert Haines, Zoning Commissioner
Office of Planning & Zoning
Baltimore County Office Building
Towson, Maryland 21204

Re: Property Owner: Ronald F. Jones, et ux

Location: NE/S Central Avenue, 125' SE of Glyndon Avenue

Item No.: 356 Zoning Agenda: February 28, 1989

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this
Bureau and the comments below marked with an "X" are applicable and required to
be corrected or incorporated into the final plans for the property.

- () 1. Fire hydrants for the referenced property are required and shall be
located at intervals of _____ feet along an approved road in accor-
dance with Baltimore County Standards as published by the Depart-
ment of Public Works.
- () 2. A second means of vehicle access is required for the site.
- () 3. The vehicle dead end condition shown at _____
EXCEEDS the maximum allowed by the Fire Department.
- () 4. The site shall be made to comply with all applicable parts of the
Fire Prevention Code prior to occupancy or beginning of operation.
- (X) 5. The buildings and structures existing or proposed on the site shall
comply with all applicable requirements of the National Fire Protec-
tion Association Standard No. 101 "Life Safety Code," 1976 edition
prior to occupancy.
- () 6. Site plans are approved, as drawn.
- () 7. The Fire Prevention Bureau has no comments at this time.

REVIEWER: [Signature] NOTED & APPROVED: [Signature]
Planning Group Fire Prevention Bureau
Special Inspection Division

89-396-SPHA

BALTIMORE COUNTY OFFICE OF PLANNING & ZONING

County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Your petition has been received and accepted for filing this
_____ day of _____, 1989

J. Robert Haines
ZONING COMMISSIONER

Petitioner: Ronald F. Jones, et ux
Petitioner's Attorney: Eleanor J. Lipsitz

Received by: [Signature]
Chairman, Zoning Plans
Advisory Committee

BALTIMORE COUNTY OFFICE OF PLANNING AND ZONING

RONALD F. JONES and
SUZANNE LUSSIER-JONES,
Petitioners

Case No. 89-396-SPHA
NE/S Central Avenue, 125 SE
Glyndon Avenue

RECEIVED
JUN 2 1989

ZONING OFFICE

PETITIONERS' BRIEF
Statement of Facts

The petitioners, Ronald F. Jones and Suzanne Lussier-Jones, acquired title to property known as 209 Central Avenue, Glyndon, Maryland, the subject of the instant petition for special hearing and petition for variance, on June 24, 1988. The property consists of a lot containing 25,545 square feet of land, more or less, and an existing structure, located in D.R. 2 and D.R. 3.5 zones. (See plats accompanying Petitioners' petitions filed herein). The structure has existed since before 1898. (Petitioners' Exhibit 1). The evidence shows that the building located at 209 Central Avenue has been operated as a boarding house and/or apartment house since, at least, the early 1900's. Even Protestant's Exhibit 8 indicates that prior to the enactment of the Baltimore County zoning regulations, 209 Central Avenue was operated as a multi-unit apartment building. A notarized letter from Anita Susemhl (Petitioner's Exhibit 3) states that the conversion of the improvements to six apartment units was

undertaken after she and her husband acquired title to the property in March, 1941.

209 Central Avenue and the adjacent lot known as 207 Central Avenue have been conveyed in one instrument, but as two separate lots, for at least sixty years. In March, 1988, the vacant lot known as 207 Central Avenue was sold by Aileen Singer to the Homestead Group. (Protestants' Exhibit 1). 209 Central Avenue was subsequently conveyed by Aileen Singer to Ronald F. Jones and Suzanne Lussier-Jones by deed dated June 24, 1988. [The Zoning Commissioner, at the conclusion of the hearing herein, found that 207 and 209 are and have been two separate lots. Hence that issue is not addressed here.]

Prior to conveying the vacant lot at 207 Central Avenue, Singer relocated a driveway and parking lot from that lot to the lot known as 209 Central Avenue. Singer obtained a building permit (Petitioners' Exhibit 5) prior to locating the driveway and parking lot on 209 Central Avenue and met with the requests of the Baltimore County Landmarks Preservation Commission with regard to the location of both the driveway and the parking lot. (Petitioners' Exhibit 6).

Petitioners Jones received Citation No. 89-038, Citation For Civil Zoning Violation, dated August 10, 1988, citing a violation of section 101; 402; 1b01.1, the alleged violation being "use of property zoned D.R. 3.5 to commit the following: Apartment building located on residential property that lacks required lot area and minimum dimensional (width/side yard) standards." At trial of that matter, the County Solicitor

nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

Evidence produced at the special hearing herein patent shows that the structure at 209 Central Avenue has been, and continues to be, operated as a multi-family dwelling since prior to the adoption of the original Baltimore County Zoning Regulations in January, 1945. Even the testimony of Protestant witnesses establishes such multi-family use prior to 1945. 209 Central Avenue was known as a boarding house and/or apartment house since the childhood of not less than one 66 year old witness, which establishes such multi-family use prior to 1945. None of Protestant's witnesses disputed Petitioners' evidence that 209 Central Avenue has been operated as a boarding house or multifamily apartment house since well before the inception of zoning regulation for Baltimore County, hence, petitioners submit, the question of the existence of a legal nonconforming use is undisputed and not in issue.

Petitioners produced evidence, both written and testimonial, to substantiate the existence of six units at 209 Central Avenue since the early 1940's. In 1941 Louis and Anita Susemhl acquired the property and converted it to six apartments (Pet. Ex. 3). James Feter and Aileen Singer testified to the continuance of the apartment building usage from Mr. Feter's childhood (he is in his sixties now) to the present time.

Petitioners submit that no witness for the Protestants disputed the petitioners' evidence of six units. Protestants' witnesses, at best, could say that they were uncertain of the exact number of apartments in the building. None of them, from their personal knowledge, could successfully challenge the existence of six units. At best, Protestants' witnesses had been in some, but not all of the units in the building, and therefore, could not identify the actual number of units. Protestants' Exhibit 8 is not, Petitioners submit, conclusive evidence of the number of units in the building except as being not less than 4. Those affidavits assert, in two instances, the existence of 4 units, in one instance, the existence of "four or more" units, in another instance, 5 units and in the remaining instance, six units. The testimony of one of Protestants' witnesses, Mrs. Hammond, attempted to show that substantial improvements were made to 209 Central Avenue in the late 1940's. This testimony was vague at best. She testified that she had no actual knowledge of what was transpiring at 209 Central Avenue and had personally seen one delivery of materials there. The preponderance of the evidence supports Petitioners' position as to the continued use of the property as a six unit apartment building.

In summary, Protestants did not controvert the existence of the boarding house and/or apartment building at 209 Central Avenue before the adoption of the Baltimore County Zoning Regulations, nor did they successfully controvert the existence of six units at 209 Central Avenue.

agreed to enter a "stet.", provided the Joneses filed the appropriate petitions with the Zoning Commissioner. Hence, this matter comes before the Zoning Commissioner for hearing on petitioners' petition for special hearing and petition for variance.

Questions Presented

1. Does the operation of a six unit apartment building at 209 Central Avenue, Glyndon, Maryland qualify as a nonconforming use?

2. Should Petitioners' request for a variance from section 402.1 of the Baltimore County Zoning Code to permit side yard setback of 12.0 feet and 12.6 feet in lieu of required 20 feet for one side and 40 feet and/or 50 feet for the sum of both side yard setbacks and to permit a lot width of 65 feet in lieu of the required 90 feet or greater as may be determined be granted?

[Petitioners do not abandon the issue of the timeliness of the hearing on their petitions as raised prior to the presentation of their evidence. In deference to the direction of the Zoning Commissioners to address certain issues, this position is not specifically addressed. However, Petitioners do not relinquish their position that the hearing date was not properly advertised to afford the 15 days notice required by the zoning regulations.]

There is evidence that Aileen Singer and her husband occupied two units on the first floor of the building. Testimony further shows that there were separate kitchen and bath facilities maintained for each unit. The occupancy of two units by a single family does not, Petitioners assert, constitute an abandonment or discontinuance of the nonconforming use. See Feldstein v. LaVale Zoning Board, 227 A.2d 713, 246 Md. 204 (1967). At most this was a temporary abatement of the six unit use. The maintenance of two separate kitchen and bath facilities for the temporarily combined two units support the contention of a temporary abatement rather than being a clear indication of intention, action or inaction which is mandated to extinguish a nonconforming use. Id. at 734.

The evidence produced by Protestants at hearing of the instant petitions, at best, shows that the only changes in the use and operation of 209 Central Avenue since at least 1945 has been the location of the driveway and parking lot, formerly located on the lot known as 207 Central Avenue, on 209 Central Avenue. Petitioners urge that, applying the guidelines set out in McKemy v. Baltimore County, Maryland, 385 A.2d 96, 39 Md. App. 257 (1978), there has been no showing of any change of the nonconforming use to any other use so as to terminate the right to continue the nonconforming, six unit apartment use already existing at 209 Central Avenue.

Argument

1. The operation of a six unit apartment building at 209 Central Avenue, Glyndon, Maryland qualifies as a nonconforming use.

The determination of a nonconforming is essentially two part. First, there must be a finding that a lawful use existed prior to the adoption of zoning regulations. (See Section 101, B.C.Z.R., 1955; Bill No. 18, 1976) Second, it must be shown that that use has continued without interruption or change. (See Section 104, B.C.Z.R., 1955, Bill 18, 1976) Also see McKemy v. Baltimore County, Md., 30 Md.App. 257, 385 A.2d 96 (1978).

January 2, 1945 marks the inception of the Baltimore County zoning regulations. The County Commissioners then adopted a comprehensive set of zoning regulations. McKemy supra, at 98; Kahl v. Cons. Gas El. & Pwr. Co., 191 Md. 249, 254, 60 A.2d 754 (1948); Calhoun v. County Bd. of Appeals, 262 Md. 265 277 A.2d 589 (1971). Section XI, 1945, B.C.Z.R. first provided for nonconforming uses. On March 30, 1955, the County Commissioners adopted a new set of comprehensive zoning regulations. See McKemy. Section 104 of those regulations dealt with nonconforming uses. Currently, Section 104.1, as adopted on March 15, 1976 by Bill No. 18-76, of the Baltimore County Zoning Regulations provides for nonconforming uses. In pertinent part, Section 104.1 provides:

"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

McKemy supra, at 104, clearly set forth the criteria to be applied in determining whether or not there has been a change in the use of the property which would serve to break the continued nature of the nonconforming use. These are:

- "(1) to what extent does the current use of these lots reflect the nature and purpose of the original nonconforming use;
- (2) is the current use more, by a different manner of utilizing the original nonconforming use or does it constitute a use different in character, nature, and kind;
- (3) does the current use have a substantially different effect upon the neighborhood;
- (4) is the current use a 'drastic enlargement or extension' of the original nonconforming use."

Petitioners' Exhibit 2 shows 209 Central Avenue as it exists today. A driveway runs parallel to and along the property line between 207 and 209 Central Avenue. No parking is visible from Central Avenue. The parking lot for 209 Central Avenue is located to the rear of the structure located thereon. Evidence shows that the use of 209 Central Avenue as a multi-family dwelling has changed since the adoption of zoning regulations only in the locating of the driveway and parking lot on 209 Central Avenue. The nonconforming use operating at 209 Central Avenue is the same six unit apartment building that has existed, and been in operation in the same manner, over the period of years predating the enactment of the Baltimore County Zoning Regulations. The location of the driveway and parking lot on 209 Central Avenue in no way changes the continuous operation of the six unit apartment building. It does not, in any way, reflect a

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different nature and purpose of use than existed prior to 1945. The driveway and parking lot are an intimate part of the operation of the six units at 209 Central Avenue, not a new or different usage of the property; they represent no difference in the basic use of the property than existed prior to March, 1988. There has, thus, been no change in operation of the premises at 209 Central Avenue that reflects anything, but the nature and purpose of the original nonconforming use.

The current use reflects totally the nature and purpose of the original nonconforming use. The property, as always, is being used as a multi-family dwelling. The fact that the parking for the residents of 209 Central Avenue is now on that property and behind the building does not in any way reflect a new usage of the property. This does not constitute a usage different in character, nature and kind than that which has long existed, i.e., a multi-family dwelling.

The current use does not have a substantially different effect upon the neighborhood. The building, as testimony of even Protestants' witnesses shows, has not changed in size, shape or character since the early 1940's. Its operation as a multi-family dwelling has not changed. The location of the parking lot and driveway on the lot has not substantially changed the effect of the operation of 209 Central Avenue on the community. Some of Protestants' witnesses testified that the operation of the apartment building had not undergone any substantial change since 1945, supporting Petitioners' position. A complaint relating to dust caused by crusher run surfacing of the

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building thereon and that the existence and operation of the property are not injurious to the public health, safety or general welfare. One complaint heard concerned dust caused by the new crusher run surface on the driveway. This concern can be addressed by using some other surface or other corrective methods to control the dust production. The discomfort complained of is caused not by the driveway and its location but by the material used. This can easily be rectified well short of denial of a variance.

There was no showing that the granting of the variances sought will be inharmonious with the spirit and intent of applicable zoning regulations. The gist of the zoning regulations for Baltimore County support appropriate use and re-use of large dwellings in residential zones. Even the conversion of the structure, if that were the case, would support the granting of the variances. (Protestants repeatedly referred to their desire to maintain the ambience of the Gylndon area. To grant the necessary variances for 209 Central Avenue is compatible, perhaps even required, to protect the very existence of the structure at 209 Central Avenue.)

The facts surrounding 209 Central Avenue clearly reflect that the criteria for granting a variance have been fully met.

Bounds, supra, would deny the granting of a variance even where otherwise appropriate if the circumstances requiring the variance have been created by the property owner or a predecessor in title. This, Petitioners urge, is not the case in the instant situation.

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driveway go not to the effect of the usage but to the composition of the driveway surface, a condition which can be easily corrected and should not go to the issue of the nonconforming use. The parking and driveway are not, Petitioners reiterate, a change in the original use. The parking is now to the rear of the building on 209 Central Avenue. Parked vehicles are not visible from Central Avenue by virtue of the very location of the lot behind the structure. If anything, this affects the community, beneficially by limiting the visibility of parked vehicles. The location of both the driveway and the parking lot were approved by the Baltimore County Landmarks Preservation Commission (Petitioners' Exhibit 6) and the work done in compliance with a permit from Baltimore County (Petitioners' Exhibit 5). There was no showing of opposition by the community to the application or issuance of the permit.

Petitioners urge that the current use of the property is not a drastic enlargement or extension of the original usage. It is at most a mere intensification and as such is permissible so long as the nature of use, as here, is not changed. Phillips v. Zoning Commissioner of Howard County, 255 Md. 102, 169 A.2d 410 (1961). As the Court recognized in Phillips, the determination of drastic enlargement or extension or mere intensification is to be made of the facts of each case. There is nothing in the instant case to show a change from one nonconforming use to another or a substitution of one nonconforming use for another. The property is still, as ever, a multi-family dwelling. It has not been converted any different usage by the location of the

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Clearly the Petitioners did nothing to cause the hardship complained of here. The evidence shows that Petitioners had entered into a contract with Aileen Singer prior to any official notification of any possible zoning violations. The testimony offered further shows that Petitioners had been assured that the property at 209 Central Avenue conformed with zoning regulations. The Petitioners are not knowledgeable in real estate transactions. Ronald Jones testified that this was the first experience he or his wife had with zoning. He testified that he had conversations with neighbors and was led to believe that no problem related to the continued operation of the 6 units, but rather with the proposed development of 207 Central Avenue. It was not until the Petitioners received a citation dated 8-10-88 that they were made aware of any zoning problem. Mrs. Singer had sold the adjoining lot in March, 1988. Between March and June, 1988, Petitioners had verbal communications with citizens of the area which led them to believe that 209 Central Avenue met zoning requirements. The Joneses are not experienced in real estate. They may have been naive in their acquisition of 209 Central Avenue, but that does not constitute the self-inflicted hardship referred to in

There is evidence that predecessors in title made efforts to determine that 209 Central Avenue was a lot independent of 207 Central Avenue in the event of separate ownership of the lots. Aileen Singer, who conveyed the property to the Petitioners, testified that on two occasions she approached the Baltimore County Zoning office to determine

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parking lot and driveway serving, and a part of the operations of the existing nonconforming use. The current usage contemplates only the continuation of that usage, nothing more. Petitioners contend there is no evidence upon which to base a finding of drastic enlargement or extension.
2. Petitioners' request for a variance from section 402.1 of the Baltimore County Zoning Code to permit side yard setback of 12.0 feet and 12.6 feet in lieu of required 30 feet for one side and 40 feet and/or 50 feet for the sum of both side yard setbacks and to permit a lot width of 65 feet in lieu of the required 90 feet or greater as may be determined should be granted.

The granting of a variance is not properly a popularity contest. Such determination is to be based upon judicial principles and zoning regulations. The proper criteria are:

- whether strict compliance with the zoning regulations for Baltimore County result in practical difficulty or unreasonable hardship
- whether the granting of a variance will result in substantial injury to public health, safety and general welfare;
- whether the granting of the requested variance will be inharmonious with the spirit and intent of applicable zoning regulations; and
- whether the hardship complained of, and which is the basis of petitioners request for variances self-inflicted.

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whether 207 and 209 Central Avenue were so connected as to deny their separation. On both occasions, she was informed of no bar to the separate development of 207 Central Avenue nor to the continued operation of 6 units at 209 Central Avenue. James Reter, who owned both lots in the 1960's, testified that it was his intention to develop and sell 207 Central Avenue and had never known that that would not be possible.

Unlike the situation in Bounds, there was no cavalier delegation of responsibility for obtaining the necessary permits or information. There was no failure to get permits or to inspect the permit that was issued. In fact Singer was granted a permit for a parking lot and driveway (Petitioners Exhibit 5) located on 209 Central Avenue and used in conjunction with the operation of that property as a 6 unit apartment building. At the time of settlement on 209 Central Avenue, in June, 1988, some three months after the transfer of 207 Central Avenue to the Homestead Group, there were no zoning violations outstanding on that property. It was not until well after Petitioners' settlement on the property that they received any official notification of a potential zoning problem. The evidence shows no self-inflicted hardship anywhere in the chain of title.

The testimony and evidence supports a finding that there was no self-inflicted hardship; that the granting of the variances will not be contrary to the spirit of the B.C.R.Z. nor result in substantial detriment to the public health, safety and general welfare. The granting will relieve a hardship due to unique circumstances which cannot be alleviated otherwise.

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[B.C.R.Z., 1955; Bills No. 87, 1961; No. 19, 1962; also see, Salisbury Board of Zoning Appeals v. Bounds, 240 Md. 547, 214 A.2d 810 (1965).]

Obviously, if the current side yard setback and lot width requirements are applied to 209 Central Avenue practical difficulty and unreasonable hardship would result. The lot known as 209 Central Avenue exists and the structure, erected thereon in the 1890's (Petitioners' Exhibit 1), exists. To try to squeeze the property and building into the limitations of current zoning requirements would be judicially unfair and physically impossible without the destruction of the building. The building was erected prior to any requirements imposed by zoning and must be allowed to continue in that form since it has not changed since prior to zoning. There is no way to stretch the given land to accommodate the present zoning rules and regulations.

The granting of the requested variances will not result in any, much less, substantial injury to public health, safety and general welfare. There was no evidence to support any such injury at the hearing herein. At least one witness, Zelma Ensor, characterized 209 Central Avenue as an asset to the community. Even Protestants' witnesses, while not necessarily happy with the proposed development of the adjacent lot, identified no harm which would result to the community by the granting of the requested variances. In fact, again, the evidence shows not only the absence of any such harm, but the fact that the granting of such variances only recognizes the long existing situation with regard to lot size of 209 Central Avenue and the location of the

-16- Conclusion

For the reasons stated, Petitioners' petition for special hearing to recognize the legal, nonconforming use of 209 Central Avenue as a six unit apartment building and petition for variance should be granted.

Respectfully submitted,

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I hereby certify that a copy of the foregoing brief was mailed to Charles B. Heyman, Esquire, 10th Floor, Sun Life Building, 20 South Charles Street, Baltimore, Maryland 21201 and to G. Scott Barhight, Esquire, 300 Lafayette Building, 40 West Chesapeake Avenue, Towson, Maryland 21204, this 2nd day of June, 1989.

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