4/26/05

IN THE MATTER OF THE APPLICATION OF LINDA AMOS AND SUSANNE GIGLIOTTI - PETITIONERS; 111 MELLOR AVENUE PROPERTY FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE NE/S MELLOR AVENUE, 1,383' S OF C/L OF FREDERICK ROAD 1ST ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	* BEFORE THE * COUNTY BOARD OF APPEALS * OF * BALTIMORE COUNTY * CASE NO. 03-456-SPH

* * * * * * * * *

OPINION

This is an appeal from a decision of the Zoning Commissioner in which the Zoning Commissioner granted relief requested in a Petition for Special Hearing.

The hearing before the Board took place on December 22, 2004. Petitioners, Linda Amos, Susanne Gigliotti, and Lewis and Cindy Kubiet, were represented by Michael P. Tanczyn, Esquire. The Kubiets were allowed to participate as parties at the hearing before the Board although they only testified as witnesses below. They live on Mellor Avenue, near the property in question. Between the Zoning Commissioner's hearing and the hearing before the Board, Ms. Amos and Ms. Gigliotti moved away from Mellor Avenue. The Appellant /Respondent was represented by Benjamin Bronstein, Esquire. The amendment of the Petition to include the Kubiets was contested by Counsel for the Appellant /Respondent, Drenner Concrete /Purchaser-Legal Owner, Wayne Odochowski.

Facts

The testimony indicated that the property in question is located on the east side of Mellor Avenue in Catonsville, just south of the intersection of Mellor Avenue and Frederick Road. The property is rectangular in shape, about 60 feet by 355 feet, and is approximately .5 acre in size. It is zoned B.M. with a small remaining portion of the property zoned D.R. 2.

Improvements on the property include a one-story tin shed, 18 feet by 40 feet in dimension which is located in the southern D.R. 2 portion of the site. A container is located in the northern portion of the site which is zoned B.M. Additionally, there is a concrete retaining wall and a long concrete pad along the rear of the property which crosses the zone line, and there are several concrete parking bays along the northern property line. The remaining area of the property is unimproved. The property is enclosed with

a combination chain-link and wood property fence.

The City of Baltimore originally owned the subject property from approximately 1925 until March of 2000. The property was used by the City as a maintenance yard to house a Baltimore City Water Department utility truck. Testimony revealed that in approximately the late 1980s the City generally stopped using the property and removed the existing materials from the site. On October 24, 1990, the City leased the property to Nicodemus Construction Company for use as a carpentry shop and for the storage of materials. It appeared that most of the activity on the site under Nicodemus took place in the shop with very little if any outdoor storage of materials. After approximately one year, Nicodemus vacated the site, and the site remained vacant until December 1993, when D.A. Drenner Concrete, Inc., began to use the property under a lease made with the City of Baltimore on August 3, 1993.

Testimony indicated that Drenner initially used the property for storage; however, in the mid to late 1990s, activities significantly increased. That activity included large trucks and heavy equipment being operated with back-up alarms early in the morning and late at night, and with welding activities conducted on the streets and heavy equipment being brought to the site and stored by Drenner. In the Spring of 2002, Drenner began moving its equipment out of the property, and by June 2002 it had vacated the property. The property remained vacant until the Spring of 2004 at which time it was sold by deed dated May 20, 2004 to Gateway Partners, which is owned by Wayne Odochowski. He now seeks to overturn the decision of the Zoning Commissioner.

Coincidental with the increased activity on the site by Drenner Concrete in the late 1990s, the Petitioners, who were neighbors, filed a complaint with Baltimore County as the result of the increased noise and dust raised by the operation of Drenner. As a result of that complaint, there have been at least four Code violation citations issued for the property and hearings conducted in those matters under Case Nos. 98-2180, 99-6305, 00-0836, and 00-1503. The nature of these alleged violations was that the property was being used as a contractor's equipment storage yard, which was not a permitted use in the B.M./D.R. 2 zone.

Copies of two decisions rendered in those cases by the Hearing Officer for the Department of

Permits & Development Management were offered at the hearing. In Case No. 98-2180, Code Violation Hearing Officer Stanley J. Schapiro dismissed the citation. In his written decision, he stated, "I am persuaded that the subject property has been used as a contractor's or construction equipment storage lot since at least 1938, and quite possibly before 1938." He also noted that § 104 of the *Baltimore County Zoning Regulations* (BCZR) permits the continuation of a nonconforming use. A nonconforming use is defined in BCZR § 101 as a "legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such use." The Hearing Officer held that the property was a nonconforming use and there was no violation.

A similar result was reached in Case No. 00-1503. In that matter, similar citations were issued regarding use of the property. Following a public hearing, the Hearing Officer Stanley Schapiro noted again that the property had been used by Baltimore City for the storage of heavy equipment and material used to maintain water and sewer service in Baltimore County. Hearing Officer Schapiro also noted the doctrine of *res judicata* or Claim Preclusion. These doctrines prohibit additional litigation when the identical issue had previously been litigated between the same parties. He opined that the citation issued in Case No. 00-1503 must be dismissed because, "Baltimore County is precluded from prosecuting this matter by the Doctrine of *Res Judicata*."

Issues

The instant case raises four issues which must be determined by the Board.

1. Do the Petitioners, Linda Amos, Susanne Gigliotti, and Lewis and Cindy Kubiet, have standing to pursue the petition before the Board or must the petition be dismissed?

2. Does the Baltimore County Code Enforcement Official have the authority to determine the existence of a nonconforming use, and, if so, does his decision have preclusive (or *res judicata*) effect on a Petition for Special Hearing?

3. Was there ever any nonconforming use on the property, and, if so, has it been terminated by change or discontinuance under § BCZR 104?

4. Does the Doctrine of Latches prohibit the Petitioners from pursuing their Petition for Special Hearing?

Decision

Issue No. 1: Do the Petitioners, Linda Amos, Susanne Gigliotti, and Lewis and Cindy Kubiet, have standing to pursue the petition before the Board or must the petition be dismissed?

The testimony revealed that, since the Hearing Officer's decision, Linda Amos has moved several blocks away from Mellor Avenue to the other side of Frederick Road, and Susanne Gigliotti Johnson has moved to Parkville. Lewis and Cindy Kubiet still live on Mellor Avenue and participated in the proceedings below but were not original Petitioners. The Kubiets asked for and were granted leave to become parties during the hearing before the Board.

While the hearing before the Board is a *de novo* hearing under County Charter § 603, the Board's jurisdictions is still appellate. Therefore, regardless of who may be interested at this point, the Zoning Commissioner has made a determination which stands unless reversed after hearing. [See *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 71-75 (2003).] It is clear that anyone who expresses an interest in an administrative hearing thereby becomes a party, unless excluded by valid statute or regulation. The standard is different from, and more relaxed than, the "standing" principle applicable in the courts. Quoting his own opinion in *Sugarloaf Citizens v. M.D.E.*, 344 Md. 271 at 286-87, Judge Eldrich wrote in *Dorsey*:

> The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily. In holding that a particular individual was properly a party at an administrative hearing, Judge J. Dudley Digges for the Court in *Morris v. Howard Res. & Dev. Corp*....explained as follows:
>
> > "He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should be not approved. This is far greater participation than that previously determined sufficient to establish one as a party before an administrative agency...."

Linda Amos still lives close enough to be affected differently from the public in general. She testified that the impact of the use on Frederick Road traffic in her neighborhood, ½ block from her house, is a particular problem. Lewis and Cindy Kubiet, although not original petitioners, participated at the Zoning Commissioner level. They were allowed to become parties before the Board. Mr. Kubiet

testified before the Board as to the history of the property and the annoyance which emanated from the property after the Drenner Concrete operation took over the property.

The Board affirms its position of granting the Kubiets Petitioner status and of continuing to allow Ms. Amos and Ms. Gigliotti to have Petitioner status in this matter.

Issue No. 2: Does the Baltimore County Code Enforcement Official have the authority to determine the existence of a nonconforming use, and, if so, does his decision have preclusive (or *res judicata*) effect on a Petition for Special Hearing?

Appellant /Respondent argues that the two decisions by the Code Enforcement Officer in Cases No. 98-2180 and Case No. 00-1503 were dispositive of this matter in that the Code Enforcement Officer found that there was a nonconforming use at the property and that the Petitioners were precluded by the Doctrine of *Res Judicata* or Collateral Estoppel from pursuing the matter further through a Petition for Special Hearing.

The Board rejects the contention that *res judicata* or collateral estoppel bars the Petition for Special Hearing in this matter. First, the hearing before the Code Enforcement Officer involved the County versus Drenner Concrete. The parties were not the same as those parties before the Board in the current Petition.

Second, §§ 500.6 and 500.7 of the *Baltimore County Zoning Regulations* (BCZR) give the Zoning Commissioner the power to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations or the proper interpretation thereof. Section 500.7 states:

> The said zoning commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the county board of appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the zoning commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.

While the Appellant /Respondent contends that the Code Enforcement Officer had the right to determine the nonconforming use on the property, it is the position of this Board that that authority lies only with the Zoning Commissioner in accordance with § 500.7 of the BCZR.

However, even if the Code Enforcement Officer had the authority to determine the nonconforming use, he did not have all the facts before him or did not consider all the facts with respect to a nonconforming use as set forth below.

Issue No. 3: Was there ever any nonconforming use on the property, and, if so, has it been terminated by change or discontinuance under § BCZR 104?

Nonconforming uses are defined in BCZR § 101 as follows:

> A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

BCZR § 104 governs these uses and states in pertinent part:

> A nonconforming use (as defined in § 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.

In this Board's opinion, the language is clear that, regardless of the intent of the parties, if the use is abandoned or discontinued for a period of one year or more, the nonconforming use is lost. [See *Canada Tavern, Inc., v. Town of Glen Echo*, 260 Md. 206, 271 A.2d 664 (1970).]

Even if Baltimore City were exempt from the zoning laws of Baltimore County, which this Board does not believe is the case, the evidence is clear that the property was abandoned on several occasions for a period in excess of one year. Thus, according to the testimony of Mr. Kubiet, Nicodemus Company left the property in 1991 and the property sat empty until 1993 when it was leased to Drenner Concrete. The property then sat empty once more when Drenner left the property, and it was over one year until it was purchased by the current owner, Gateway Partners, LLC, and Wayne Odochowski, the principal owner.

In addition, the Board considers that the City of Baltimore was not exempt from the *Baltimore County Zoning Regulations*. The Board is persuaded by the argument set forth by People's Counsel in its brief in which it cites the case of the *City of Annapolis v. Anne Arundel County*, 271 Md. 265 (1974). In that case, the Court held that the County was subject to the Annapolis Historic District zoning ordinance.

The case turned on the interpretation of the "historic area zoning" ordinance passed by the General Assembly, which enabled counties and municipal corporations to establish historic districts and structural controls. Judge Barnes stated at 271 Md. 289:

> This court has held, however, that a county can be subject to the reasonable police regulations of an incorporated municipality.

We have been given no legal citations which would lead us to a contrary opinion. In American *Health Organization v. Montgomery Co.*, cited by the Appellants, the Court stated that a State is not governed by its own enactments. This case refers to the State of Maryland and its instrumentalities and does not refer to all levels of government. However, even if Baltimore City were exempt from the *Baltimore County Zoning Regulations* as a municipality, it lost that exemption when it leased the property to Nicodemus Construction Company in the early 1990s. Even though it might have been City property, the use by Nicodemus was not City business but was a private construction company operating on the property. Even that changed the operation of the property from the storage of a utility truck by the City to the operation of a construction company on the site. This alone would appear to cause the loss of the nonconforming use.

In any event, the Hearing Officer did not cite any of these conditions in either of the two hearing decisions cited by the Appellants in this matter. Therefore, the Board considers that this was a mistake in interpretation of the law. As cited by the Court of Special Appeals in *Board of County Commissioners of Cecil County v. Racine*, 24 Md.App. 435, 332 A.2d 306 (1975), "Mistaken interpretations of law, however honestly arrived at, are held not to be within the exercise of sound administrative discretion and the legislative prerogative, but to be arbitrary and illegal. Perpetration of illegality by an administrative but inflexible application of the principle of res judicata is impermissible." Thus, the Board does not consider that the Code Enforcement Officer's finding of a nonconforming use was a valid exercise of the Doctrine of *Res Judicata* or Collateral Estoppel.

Issue No. 4: Does the Doctrine of Latches prohibit the Petitioners from pursuing their Petition for Special Hearing?

Since the issue of latches was never raised either with the Zoning Commissioner below or with

the Board during the hearing in this matter, but was first raised by the Appellant in its brief, the Board declines to rule on the issue of latches in this matter.

ORDER

THEREFORE, IT IS THIS 26th day of April, 2005 by the County Board of Appeals of Baltimore County

ORDERED:

1. That Linda Amos, Susan Gigliotti, and Lewis and Cindy Kubiet are eligible to maintain their status as Petitioners in the instant matter;
2. The subject property does not enjoy a valid, nonconforming use status as a contractor's equipment storage yard;
3. That Baltimore City's use of the property did not constitute an activity which made the property exempt from the *Baltimore County Zoning Regulations* (BCZR) while so utilized;
4. That even assuming that Baltimore City was exempt from *the Baltimore County Zoning Regulations*, the subsequent lease of the property is a proprietary function for remuneration, which made the property subject to the BCZR beginning with the lease term; and
5. That the Zoning Commissioner /Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a nonconforming use; and it is further

ORDERED that the Petition for Special Hearing filed by Petitioners /Protestants in Case No. 03-456-SPH be and the same is hereby **GRANTED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chair

Margaret Brassil, Ph.D.

John P. Quinn

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
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410-887-3180
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April 26, 2005

Benjamin Bronstein, Esquire
EVANS, GEORGE AND BRONSTEIN
Susquehanna Building, Suite 205
29 W. Susquehanna Avenue
Towson, MD 21204

RE: *In the Matter of: 111 Mellor Avenue Property;*
Linda Amos and Susanne Gigliotti – Petitioners /Protestants
Case No. 03-456-SPH

Dear Mr. Bronstein:

Enclosed please find a copy of the final Opinion and Order issued this date by the County Board of Appeals of Baltimore County in the subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all subsequent Petitions for Judicial Review filed from this decision should be noted under the same civil action number as the first Petition.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Kathleen C. Bianco

Kathleen C. Bianco
Administrator

Enclosure

c: Mr. Wayne Odochowski c/o Mr. Bronstein
Michael P. Tanczyn, Esquire
Susanne Gigliotti
Linda Amos
Lewis and Cindy Kubiet
Office of People's Counsel
William J. Wiseman III /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

FILE

Printed with Soybean Ink
on Recycled Paper

1/28/05

RE: PETITION FOR SPECIAL HEARING NE/S Mellor Avenue; 1,383' S of c/l Frederick Road (111 Mellor Avenue)	*	BEFORE THE COUNTY BOARD
1st Election District, 1st Councilmanic District	*	OF APPEALS
Legal Owner(s): D.A. Drenner Concrete, Inc Contract Purchaser(s): Linda J Amos & Susanne Gigliotti	*	FOR BALTIMORE COUNTY
Petitioners	*	Case No. 03-456-SPH

* * * * * * * * * * * *

RECEIVED
JAN 27 2005
BALTIMORE COUNTY
BOARD OF APPEALS

People's Counsel for Baltimore County's Supplemental Memorandum

This memorandum supplements the hearing memorandum submitted in conjunction with the opening statement at the hearing December 23, 2004. It takes into consideration the factual record concerning the historic uses of the property at 111 Mellor Avenue. It also takes into account the zoning history, as more specifically described in the memorandum from the zoning office. People's Counsel's Exhibit 1.

The initial hearing memorandum dealt with the questions of whether or not the Hearing Officer's opinions in enforcement proceedings have any *res judicata* or preclusive effect, and whether or not Baltimore City enjoys immunity from Baltimore County zoning, so that any use during its period of ownership would be legal. People's Counsel's position remains unchanged that there is no such preclusive effect, and that Baltimore City does not enjoy immunity. On the subject of immunity, our position is reinforced by the presence of public utility uses as regulated uses under the special exception provisions of the Density Residential and Business Zones. BCZR 1B01.1C15-17, 230.13, and 411. Baltimore City's use as described in the record is analogous to a public utility use.

The initial hearing memorandum also introduced the law concerning termination of a nonconforming use based on change, abandonment, or discontinuation. In view of the record before the Zoning Commissioner, the discussion there focused primarily on the law concerning discontinuation. The present memorandum supplements that discussion based on the evidentiary record and discusses the law regarding change in more detail.

In addition, because of the preliminary motion directed to the ability of the interested citizens to participate, this memorandum will address the procedural issues. Because they are preliminary, we address them first.

I. Special Hearings; Appeals; Interested Parties

BCZR 500.7 provides broad authority for the Zoning Commissioner to conduct a hearing "as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations ... " He may initiate such hearings on his own, or at the request of an "interested person." This includes "the power ... to determine the existence of any purported nonconforming use on any premises ... "

The zoning office has given the name "special hearing" to hearings conducted under this section. This name differentiates such hearings from special exception, variance, and development plan hearings. Over the years, both property owners and other interested citizens have filed petitions for special hearings to determine both nonconforming use status and other zoning law issues. People's Counsel v. Maryland Marine 316 Md. 491 (1989); Board of Child Care v. Harker 316 Md. 683 (1989); Marzullo v. Kahl 366 Md. 158 (2002).

Here, area citizens brought the petition to determine nonconforming use status at 111 Mellor Avenue. At the zoning commissioner level, there was dispute that the citizens

had the right to file the petition. The Zoning Commissioner found that nonconforming use status had expired. Upon appeal, the property owner (now Gateway Partners) claims that the citizens lack standing because the original petitioners have moved away from Mellor Avenue. Linda Amos has moved several blocks away to the other side of Frederick Avenue. Suzanne Gigliotti Johnson has moved to Parkville. Lewis and Cindy Kubiet, who still live on Mellor Avenue, participated in the proceedings below, but were not original petitioners. The Kubiets asked for and were granted leave to become parties.

There is still a live controversy for several reasons. First of all, once a petition for special hearing is properly brought and decided, the Zoning Commissioner's decision is valid and enforceable unless overturned. While the CBA hearing is *de novo* under County Charter Sec. 603, its jurisdiction is still appellate jurisdiction. UPS v. People's Counsel 336 Md. 569 (1994). Therefore, regardless of who may be interested at this point, the Commissioner has made a determination which stands unless reversed after a hearing.

Secondly, there remain interested citizens. At the agency level, there is no requirement of proximity. We have cited on several occasions, and we repeat here, the Court of Appeals' admonitions on this subject. Dorsey v. Bethel A.M.E. Church 375 Md. 59, 71-75 (2003) reiterated recently that anyone who expresses an interest in administrative proceeding thereby becomes a party, unless excluded by a valid statute or regulation. The standard is different from and more relaxed than the "standing" principle applicable in the courts. Quoting his own opinion in Sugarloaf Citizens v. MDE 344 Md. 271, at 286-87, Judge Eldridge wrote in Dorsey:

> "The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily. In holding that a particular individual was properly a party at an

administrative hearing, Judge J. Dudley Digges for the Court in Morris v. Howard Res. & Dev. Corp ... explained as follows:

> 'He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should not be approved. This is far greater participation than that previously determined sufficient to establish one as a party before an administrative agency. *See, e.g., Baxter v. Montgomery County,* 248 Md. 111, 113, 235 A.2d 536 (1967) (per curiam) (submitting name in writing as a protestant); *Bryniarski v. Montgomery Co.,* 247 Md. 137, 143, 230 A.2d 289, 293-94 (1967) (testifying before agency); *Hertelendy v. Montgomery City.,* 245 Md. 554, 567, 226 A.2d 672, 680 (1967) (submitting into evidence letter of protest); *DuBay v. Crane,* 240 Md. 180, 184, 213 A.2d 487, 489 (1965) (identifying self on agency record as a party to proceedings); *Brashears v. Lindenbaum,* 189 Md. 619, 628, 56 A.2d 844, 849 (1948) (same). Bearing in mind that the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings.'"

Sugarloaf Citizens v. MDE also explained that participation does not depend on success on the merits. There, Judge Eldridge wrote, at 344 Md. 295:

> "Therefore, standing to challenge governmental action, and the merits of the challenge, are separate and distinct issues. ... ('The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court and not on the issues he wishes to have adjudicated'); ... ('distinguishing between "the merits of the substantive issues decided by the Board" and whether "the appellants have the requisite standing to have those issues reviewed"') ...."

Thirdly, even if there were a stricter rule, Linda Amos still lives close enough to be affected differently from the public in general. She testified that the impact of the use on Frederick Avenue traffic in her neighborhood a half block from her house, is a particular problem. As for Lewis and Cindy Kubiet, although they were not original petitioners, they participated at the ZC level and thereby became parties. There is no question of their interest in the case.

Fourthly, while it may not have been necessary, the CBA allowed the motion of the Kubiets to be added as parties. As the record discloses, they became parties below and surely had a right to be parties at the CBA level.

For these reasons, the Zoning Commissioner decision holds unless reversed, and there are viable parties on the citizen/protestant side of the case. For the same reasons, Gateway Partners, the new property owner, may also participate as an interested party.

II. Discontinuation of the Nonconforming Use

The property is split-zoned B.M. and D.R. 2. The case has proceeded on the basis that this zoning has been in place for many years. The zoning office has confirmed that the business/residential split has been in place at least since the 1960s. People's Counsel Exhibit 1. The particulars of the residential zone have changed, but that does not affect the case. The proposed private use for a contractor's equipment storage yard is not allowed in any of the zones placed on the property for over forty years.

The early history of the site is not clear. But if we give the benefit of the doubt, based on Mr. Kubiet's testimony, that Baltimore City used the property to park utility trucks prior to the advent of zoning, then the City would have enjoyed a nonconforming use for that purpose.

But the evidence indicates that the use was discontinued on two or three occasions. In the late 1980s, the City's use ended. In the early 1990s, the City leased the property to Nicodemus Construction Company; but its use of the site was minimal at best. In about 1993, D.A. Drenner Concrete, Inc. came on the scene and leased the property. It was Drenner's expanded use for what amounts to a construction equipment storage yard which sparked neighborhood opposition and enforcement action. Drenner

eventually purchased the property in 2000. But it, too, eventually discontinued operations. The evidence is that the site was vacant from mid-2002 to mid-2004. In the latter year, Drenner sold the property to the current owner, Gateway Construction.

The gist of all this is that there were periods of discontinuity lasting more than a year both before and after Baltimore City's period of ownership. Under BCZR 104.1, a nonconforming use terminates upon discontinuation for a year or more.

There is no dispute about these periods of discontinuity. Even if Baltimore City were immune from County zoning, the last period of discontinuity came after the City sold the property. Once a nonconforming use terminates, it cannot revive.

III. Change of the Nonconforming Use.

There is yet another problem. Baltimore City's use involved the parking of utility trucks. It was apparently a relatively benign use and did not have a significant impact on the neighborhood. As noted above, it appears to have been comparable to a public utility use or storage yard. It may have been eligible for a special exception, although there is no record of any application or approval. From all indications, the Drenner operation involved different types of equipment and facilities, and had a far greater impact on the neighborhood.

Under these circumstances, the law does not favor a change in the nonconforming use by a kind of "creeping" process. Phillips v. Zoning Commissioner or Howard County 225 Md. 102 (1961). A property owner must prove both continuity and persistence of the same nonconforming use. A change or extension may come quickly or slowly. Either way, it terminates the nonconforming use. Calhoun v. County Board of Appeals of Baltimore County 262 Md. 265 (1971). In general, the law does not favor nonconforming

uses and contemplates their gradual disappearance. Prince George's County v. E.L. Gardner 293 Md. 259 (1982).

Conclusion

The record is clear that any nonconforming use has terminated because of discontinuity, change, or both. Baltimore City did not have any zoning immunity, but the conclusion would be the same if it did.

The new owner, Gateway Partners, is subject, therefore, to the use controls of the B.M. and D.R. zones, respectively. There are many business uses available, but contractor's equipment storage yard is not among the enumerated uses allowed by right or special exception.

Finally, the CBA is not bound by the findings or conclusions of Hearing Officer Stanley Schapiro in the enforcement proceeding. There is a further question as to whether he had the authority to make a nonconforming use finding there; but if so, its impact would be limited to that proceeding based on the nature of the enforcement process and the parties involved.

Peter Max Zimmerman
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. DeMilio
CAROLE S. DEMILIO
Deputy People's Counsel
Old Courthouse, Room 47
400 Washington Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2005, a copy of the foregoing People's Counsel for Baltimore County Supplemental Memorandum was mailed first class mail, postage pre-paid to Michael Tancyzn, Esquire, 606 Baltimore Avenue, St. 106, Towson, MD 21204 and Benjamin Bronstein, Esquire, 29 Susquehanna Avenue, Suite 205, Towson, MD 21204.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
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PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

January 28, 2005

RECEIVED
JAN 27 2005
BALTIMORE COUNTY
BOARD OF APPEALS

Kathleen Bianco, Administrator
County Board of Appeals
of Baltimore County
Old Courthouse, Room 49
400 Washington Avenue
Towson, MD 21204

Re: In the Matter of: D.A. Drenner Concrete, Inc, Legal Owner
and Linda J. Amos, Contract Purchaser - Petitioners
Case No.: 03-456-SPH

Dear Ms. Bianco:

Enclosed please find the original People's Counsel for Baltimore County's Supplemental Memorandum along with three copies of such for filing with regard the above-referenced case.

Thank you for your consideration.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

PMZ\rmw
Enclosures

cc: Benjamin Bronstein, Esquire
Michael Tancyzn, Esquire

1/28/05

RECEIVED
JAN 2 8 2005
BALTIMORE COUNTY
BOARD OF APPEALS

IN RE: Petition for Special Hearing 111 Mellor Avenue	*	BEFORE THE
	*	BOARD OF APPEALS
Gateway Partners, LLC, Successor Legal Owner; Linda J. Amos & Susanne Gigliotti, Petitioners	*	FOR BALTIMORE COUNTY
	*	CASE NO.: 03-456-SPH

* * * * * * * * * * * * *

APPELLANT'S MEMORANDUM

Gateway Partners, LLC, Successor Legal Owner and Appellant, by its attorney Benjamin Bronstein, submits this Memorandum in support of reversal of the decision of the Zoning Commissioner on the Petition for Special Hearing.

Statement of the Case

This is another proceeding predicated on the complaints by Linda J. Amos and Susanne Gigliotti neighbors against the successive owners of this property. The first proceeding was initiated before the Code Enforcement Official in 1998. The second proceeding was again initiated before the Code Enforcement Official in 2002. Both those proceedings resulted in determinations favorable to the property owner and adverse to Amos and Gigliotti. Specifically, the Code Enforcement Official found that the then property owner had established a legal nonconforming use of the property and denied Amos and Gigliotti's complaint to find that the use of the property was unlawful. (Code Enforcement Official Opinions Case # 98-2180 (CBA Exhibit 3) and Case # 00-1503 (CBA Exhibit 2).)

Unfazed by these repeated rejections of their efforts to shut down the use, Amos and Gigliotti initiated an action before the Zoning Commissioner of Baltimore County, based on the same facts and legal basis as their two earlier efforts. The Zoning Commissioner determined, contrary to the two prior decisions of the Code Enforcement Official, that a nonconforming use

does not exist on the property. From this decision of the Zoning Commissioner, the property owner has filed this Appeal before the Board of Appeals for Baltimore County.

Statement of Facts

At the time of the proceedings before the Code Enforcement Official and the Zoning Commissioner, the property owner operated a small concrete business from the premises located at 111 Mellor Avenue, located in Baltimore County. The property is primarily zoned BM with a small remaining portion of DR2, and is approximately .5 acres in size. The property is rectangular in shape, about 60' x 355', with frontage on the east side of Mellor Avenue. The property has a metal garage building and faces residential property on the west side of Mellor Avenue. The east side of Mellor Avenue is all commercial properties.

The 1998 proceeding was initiated after Amos and Gigliotti complained about alleged noise from the property in the early morning hours and the condition of the property. As a result of the complaint, the zoning inspector issued a code enforcement citation. The basis of the citation was that the property owner was conducting on the property a use not permitted in a BM zone.

At the hearing on the citation, the then owner of the property testified that the property was leased from Baltimore City starting in 1993. The evidence established that he operated a concrete business from the property, and that the property is surrounded by a chain link fence (now board on board screening on the front side) of the property which face the residences of Amos and Gigliotti.

The City of Baltimore presented testimony and evidence to show that the City had owned the property since 1923, and that since at least 1938 the property has been used as a site for the storage of heavy equipment and material for the maintenance of water and sewer facilities in the

County. Existing bins on the property were built by the City to store materials. The former owner and the City presented additional evidence that the property had been used as contractor's storage yard prior to the institution of zoning in Baltimore County.

Based on the evidence presented, the Code Enforcement Official found that the evidence produced by the former owner and the City demonstrated that the property had been used as a contractor's storage yard before the effective date of the zoning laws in Baltimore County. The Code Enforcement Official found that the former owner and the City had shown that the property had been nonconforming since the passage of the zoning laws of the County in 1945.

The Code Enforcement Official correctly observed that, in essence, the designation of a use as nonconforming use utilized to grandfather a use otherwise precluded by the subsequently enacted zoning laws. Thus, if a property was used in a certain fashion prior to the adoption of the zoning classification or regulation which might currently prohibit that use, the use may continue.

Based on the testimony and evidence before him, the Code Enforcement Official concluded that the use of the property was consistent with the prior use of the property by the City, which predated the enactment of zoning regulations in Baltimore County. As a grandfathered use, the Code Enforcement Official determined that the former owner's use of the property was not in violation of the Baltimore County Zoning Regulations. The complaint (Case # 98-2180) was therefore dismissed.

The second code enforcement violation proceeding initiated by the neighbors occurred in the Spring of 2002. As before, the former owner was charged with operating a contractor's storage not permitted in the zone without the benefit of a nonconforming use. Based on the testimony from the prior hearing, and considering the additional testimony of neighbors, the

Code Enforcement Official concluded that the prior determination that a nonconforming use existed on the property remained correct, saying "Based on the testimony in this case and the finding in the prior case, I am again persuaded that the subject property has been used as a contractor's construction storage since 1938 or earlier." (Case # 00-1503) The case was decided on August 5, 2002.

Having failed twice in their efforts to have the use terminated under the guise of a zoning violation, Amos and Gigliotti, after waiting eight months, instituted a proceeding before the Zoning Commissioner on April 12, 2003. That proceeding was based on the same facts and legal basis as the two prior actions – viz., that the operations of the former property owner on the property are illegal, despite the Code Enforcement Official twice concluding that the property has been used as contractor's storage yard "since 1938 or earlier."

The Zoning Commissioner construed the Baltimore County Code and the Baltimore County Zoning Regulations as precluding the Code Enforcement Official from making a determination on the existence of a nonconforming use – notwithstanding the clear delegation to the Code Enforcement Official of authority to hear and decide zoning violations issues. From this erroneous conclusion of the Zoning Commissioner, the present appeal has been brought.

Argument

A. The instant proceeding is barred by principles of collateral estoppel.

As a matter of law, principles of collateral estoppel preclude the complaining neighbors from maintaining this action. This issue was decided adversely to petitioners by the Court of Appeals of Maryland in the case of *Batson v. Shifflett*, 325 Md. 671, 602 A.2d 1191 (1992).

In *Batson*, the Court of Appeals adopted the following test for determining whether an administrative agency decision is entitled to preclusive effect: (1) whether the agency was acting

in a judicial capacity; (2) whether the issue presented was actually litigated before the agency; and (3) whether its resolution was necessary the agency's decision. 602 A.2d at 1202. This test was first enunciated in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845-46 (9th Cir. 1987), and its three prongs are supported by the Supreme Court case law on issue preclusion.

In *United States v. Utah Construction Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Id. At 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661.

Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court. *Batson*, 602 A.2d at 1200. Since Utah Construction Co., collateral estoppel routinely has been applied to factual determinations made by federal agencies following a fair adversarial hearing. *Batson*, supra and cases cited therein.

The rule in Maryland does not differ in any material respect from that adopted by the federal courts. See, *White v. Prince George's County*, 282 Md. 641, 658-59, 387 A.2d 260, 270 (1978) (preclusive effect given to quasi judicial proceeding of Maryland Tax Court, which is an administrative agency). Although early Maryland cases made the sweeping statement that decisions of administrative agencies can never be *res judicata*, this Court later came to recognize that the principles of public policy underlying the rule of *res judicata* were applicable to some administrative agencies performing quasi judicial functions. *Id.* At 658, 387 A.2d at 270.

In determining the test to be applied in considering whether to give preclusive effect to the decision of an administrative agency, the Court of Appeals in *Batson* recognized that such a determination hinges on three factors: (1) whether the agency was acting in a judicial type capacity; (2) whether the issue presented in the present proceeding was actually litigated in the previous proceeding; and (3) whether its resolution was necessary to the prior proceeding. 602 A.2d at 1200. This test was first enunciated in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845-46 (9th Cir. 1987), and its three prongs are supported by the Supreme Court case on issue preclusion. *Id.*

The first prong of the Exxon test is met in the instant case by the 1998 proceeding before the Hearing Examiner and by the 2002 proceeding before the Hearing Examiner. "By conducting a hearing, allowing the parties to present evidence and ruling on a dispute of law, the agency acted in a judicial capacity." *Id.* At 1202 (quoting from the opinion below, *Batson v. Shifflett*, 86 Md. App. 340, 356, 586 A2d. 792, 799, quoting *West Coast Truck Lines v. American Industries*, 893 F.2d 229, 235 (9th Cir. 1990).

The second prong of the Exxon test is whether the issue presented in proceeding in question was actually litigated in the prior proceeding to whose determination preclusive effect is sought to be given. *Batson*, 602 A.2d at 1202. In the present case, it is manifest that precisely the same issue – whether the use of the property is a nonconforming use – has been litigated twice before the Code Enforcement Official in 1998 and 2002.

The third prong of the Exxon test is whether resolution of the issue was necessary to the prior decision. *Id.* 602 A.2d at 1203. A factual issue is necessary to the determination only if its resolution is required to support the judgment entered in the prior proceeding. *Id.* In the present case the Code Enforcement Official twice determined – in both 1998 and 2002 – that the property had been used as a contractor's storage yard "since 1938 or earlier." Determination of

this fact, contested by the complaining neighbors who introduced evidence on the issue, was "required to support the judgment entered in the prior proceeding", viz., that use of the property constituted as a nonconforming use.

In light of the fact that the issue of whether the use of the property is a nonconforming use has been twice decided in the former property owner's favor, and under the principles of law enunciated by the Court of Appeals, the petitioners' claim in this proceeding is barred by collateral estoppel and must be dismissed. *Batson v. Shifflett*, supra.

Parenthetically, it should be noted that the Exxon test takes into account the distinction between *res judicata* and collateral estoppel. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Court discussed the distinction between *res judicata* and collateral estoppel, remarking that:

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Id. At 326 n. 5, 99 S.Ct. at 649 n. 5, 58 L.Ed.2d at 559 n. 5. These factors are incorporated in prongs two and three of the Exxon test, that the issues be actually litigated and necessary to the outcome of the prior proceeding. *Batson*, 602 A.2d at 1201.

This point is instructive in the instant proceeding to the issue of whether the construction of the zoning regulations is wholly within the province of the Zoning Commissioner. Regardless, the Petitioners' claim is precluded by the doctrine of collateral estoppel.

The authority of the Zoning Commissioner is set out in Title 1, Article 32-3-106, et seq. Baltimore County Code, 2003 Edition. This authority is further addressed in Section 500.7 of the BCZR, which provides the Zoning Commissioner has the authority to determine the

existence of any purported nonconforming use on any premises in Baltimore County. Additionally, under Section 500.6 of the BCZR the Zoning Commissioner is authorized to hold special hearings to determine the existence of any alleged violation of the zoning regulations.

The Baltimore County Council thereafter enacted a new Title 6 of Chapter 3 of the Baltimore County Code, entitled 'Code Enforcement' (Sections 3-6-101 through 3-6-402). This new Title was enacted as a delegation of the authority of the Zoning Commissioner's authority under Sections 500.6 and 500.7 of the BCZR. Section 3-6-201 specifically states that the Code Official "**In addition to any other remedy authorized by law,** the county or the Code Official may enforce and seek correction of a violation as provided in this title." (emphasis supplied). A "violation" is defined in Section 3-6-101(g) as "...the failure to comply with a provision of the County Code."

Both of the actions brought against the property owner by the neighbors involved a "violation" as defined in Section 3-6-101(g) – the operation of a business not permitted within a BM zone. In deciding these cases, the Code Enforcement Official was required, inter alia, to determine whether the use of the property was lawful. An assessment of whether the use was a legal nonconforming use was critical to the determination by the Code Enforcement Official of whether a violation existed.

The Zoning Commissioner concluded that because Section 500.7 authorized him to "... determine the existence of any purported nonconforming use on any premises . . ." the Code Enforcement Official could not also do so. Essentially, the Zoning Commissioner ruled that the Code Enforcement Official under Section 3-6-102 only has the authority to enforce violations that do not involve nonconforming uses. This conclusion of the Zoning Commissioner is in error,

and his further conclusion that the two prior decisions of the Code Enforcement Official that a nonconforming use existed was not preclusive was also erroneous and cannot be sustained.

The more logical and better reasoned construction of the relevant statutes is that the Code Enforcement Official and the Zoning Commissioner share authority in connection with nonconforming uses – the Zoning Commissioner on petitions for special hearing, and the Code Enforcement Official when the issue arises in connection with determining whether a violation on the Baltimore County Code or BCZR exists. The reading of Section 500.7 of the BCZR by the Zoning Commissioner limits the scope of Section 3-6-102 in contravention of the clear language by the Baltimore County Council.

Generally, statutes relating to remedies and procedure are to be liberally construed with a view toward the effective administration of justice, but they are not to given such a construction as will defeat or frustrate legislative intention. *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 331 A.2d 55 (1975). There is a presumption that the legislative body intends its enactments to operate together as a consistent and harmonious body of law, such that no part of the statute is rendered meaningless or nugatory. *Toler v. Motor Vehicle Administration*, 373 Md. 214, 817 A.2d 229 (2003).

Where the statute to be construed is a part of a statutory scheme, the legislative intention is not to be determined from that statute alone, rather it is to be discerned by considering it in light of the statutory scheme. *Breitenbach v. N.B. Handy Co.*, 366 Md. 467, 784 A.2d 569 (2001). Statutes that are clear when viewed separately may well be ambiguous where their application in a given situation, or when they operate together, is not clear. *Id.*

The Court of Appeals presumes that the legislative body intends its enactments to operate together as a consistent and harmonious body of law; thus, when two statutes appear to

apply to the same situation, the Court will attempt to give effect to both statutes to the extent that they are reconcilable. *State v. Ghajari*, 346 Md. 101, 695 A.2d 143 (1997). All statutes which form a general scheme must be read and construed together to arrive at the intent of the legislative body. *DeBusk v. Johns Hopkins Hospital*, 342 Md. 432, 677 A.2d 73 (1996).

In a statutory scheme, when two statutes, enacted at different times and not referring to each other, address the same subject, they must be read together; i.e. interpreted with reference to one another and harmonized to the extent possible – both with each other and with respect to the other provisions of the statutory scheme. *Breitenbach, supra.* Neither statute should be read so as to render the other, or any portion of it, meaningless, surplusage, superfluous or nugatory, if two statutes in a statutory scheme, enacted at different times and not referring to each other, address the same subject. *Id.*

Statutes relating to the same subject matter or sharing a common purpose should be read together. *Farris v. State*, 351 Md. 24, 716 A.2d 237 (1998). When two statutes involve the same subject matter, have a common purpose, and form part of the same system, full effect is given to each statute to the extent possible, and a court will not add or delete words to obtain a meaning not otherwise evident from the statutory language. *Gardner v. State*, 344 Md. 642, 689 A.2d 610 (1997).

Section 500.7 BCZR and Section 3-6-102 BCC are part of a common statutory scheme relating to zoning and zoning enforcement in Baltimore County. The reading given these sections by the Zoning Commissioner renders nugatory the authority granted the Code Enforcement Official to determine violations of the BCZR. These two sections must be read and construed so as to full effect to both. *Breitenbach, supra.* In light of the fact Section 3-6-102 was enacted after Section 500.7, and that Section 3-6-101, *et seq*. are a delegation of jurisdiction

and authority to enforce (and thereby make a determination of a violation of) the BCZR, a reading which gives effect to both sections is one by which both the Zoning Commissioner and the Code Enforcement Official (in determining the existence, *vel non,* of a zoning violation) share concurrent authority. The County Council expressly noted that the authority of the Code Enforcement Official is "[i]n addition to any other remedy authorized by law ...." Such 'other remedy' would include the authority of the Zoning Commissioner under Section 500.7 of the BCZR.

Section 3-6-102 clearly and unambiguously gives the Code Enforcement Official the authority to enforce and seek correction of violations. In order to determine whether the use of the property in question was a violation of the BCZR, it was essential for him to consider and decide whether a legal nonconforming use existed on the property. Testimony and other evidence was adduced at the original action in 1998. Under the circumstances, and in light of the *Batson* case discussed, *supra,* Linda J. Amos and Susanne Gigliotti (and their successor Louis Kubiet in interest in this continuing litigatory saga) are bound by that determination that a legal nonconforming use exists on the property.

In light of the fact that the issue of whether the use of the property is a nonconforming use has been twice decided in favor of the property owner, and under the principles of law enunciated by the Court of Appeals, the petitioners' claim in this proceeding is barred by collateral estoppel and must be dismissed. *Batson v. Shifflett*, supra.

B. <u>The evidence establishes that a nonconforming use has existed on the property from prior to the enactment of the BCZR to the present.</u>

The evidence before the Code Enforcement Official established (on two occasions) that the subject property had been used as a contractor's storage yard since "at 1938 or earlier." The

evidence further established that the former owner had purchased the property. At the hearing on the citation, the former owner testified that the property was leased from Baltimore City starting in 1993. The evidence established that the former owner operated a concrete business from the property, and that the property is surrounded by a chain link fence with screening on the front and sides of the property which face the residences across Mellor Avenue.

The City of Baltimore presented testimony and evidence to show that the City had owned the property since 1923, and that since at least 1938 the property has been used as a site for the storage of heavy equipment and material for the maintenance of water and sewer facilities in the County. Existing bins on the property were built by the City to store materials. The former owner and the City presented additional evidence that the property had been used as contractor's storage yard prior to the institution of zoning in Baltimore County.

The 1945 zoning map (see letter of People's Counsel dated January 20, 2005), clearly shows the small shed used by the City's Water Department. That shed is also shown on the 2004 zoning map. Baltimore City's use dates back to 1925 (CBA Exhibit 4). CBA Exhibit 5 clearly shows the property use as a storage yard. Mr. Kuchta's letter of March 14, 1986 (CBA Exhibit 6B) in response to Mr. Chertkoff's letter (CBA Exhibit 6A) states "Currently there is no plan to discontinue the use of the yard". The lease to Nicodemus Construction dated October 24, 1990 (Board Exhibit 9), the lease dated August 3, 1993 to the former owner (Board Exhibit 10) and the letter dated June 18, 2002 (Board Exhibit 15) from Frederick C. Grant, Chief Solicitor of City of Baltimore are compelling evidence of the continuing use of the site as a storage yard and intent not to abandon the use.

Only within the past year have there been no activities on the property – and this was due solely to compliance with the decision of the Zoning Commissioner. Notwithstanding the

cessation of active operations on the property (due to compliance with the County's directive), storage of materials continued to the present.

The determination of whether a nonconforming use has been abandoned depends upon an intention to abandon or relinquish, and some overt act, or failure to act, which carries an implication that the owner neither claims nor retains any interest in the subject matter of the abandoned use. *Stieff v. Collins*, 237 Md. 601, 207 A.2d 489 (1965). Time is not an essential element of abandonment of a nonconforming use although lapse of time may be evidence of an intention to abandon. *Id.* The temporary disuse of a nonconforming use does not amount to a surrender of the use and the owner of the property will not be deemed to have lost the right to the nonconforming use until relinquishment thereof has been clearly indicated by evidence of intention, action or inaction for a reasonable period of time. *Feldstein v. LaVale Zoning Board*, 246 Md. 204, 227 A.2d 731 (1967).

In *Kastendike v. Baltimore Association for Retarded Children, Inc.*, 267 Md. 389, 297 A.2d 745 (1972), a nursing home operation, a nonconforming use, left the premises in December of 1970 to make room for a new owner. The new utilized the premises for the care of retarded adults. Although the first resident did not move into the premises until September 1971, there was no proof of actual abandonment of the nursing-home type use of the premises. The court ruled the nonconforming use of the premises had not been abandoned within the scope of a zoning ordinance declaring such to be the case when there had been discontinuance of such for a period of 12 consecutive months or actual abandonment evidenced by removal of structures, machinery or equipment.

In the present case, the evidenced established use of the property as a contractor's storage by the City of Baltimore prior to the enactment of the BCZR. Thereafter the City leased

the property for use in the nature of a contractor's storage yard. The City thereafter sold the property to the former owner, the current owner's predecessor in title, for use as a contractor's storage yard. This evidence establishes a general chain of utilization of the property as a contractor's storage yard.

None of the testimony produced clearly shows a cessation of use of the property as a contractor's storage yard – except for the past year, in accordance with the decision of the Zoning Commissioner. Even during the past year the property was used to store materials, as testified to by the current owner of the property. Nothing more could have been done under the Zoning Commissioner's order; there is simply insufficient evidence to establish any intent to abandon or discontinue the nonconforming use of the property.

The Zoning Commissioner made a finding that the ownership of the property by the City meant the use of the property by the City could not be nonconforming. This conclusion was in error and should be reversed by this Board.

The Zoning Commissioner's ruling in this regard was premised on the observation that "[i]it is well settled that a municipality is not subject to the zoning ordinance." (Findings of Fact and Conclusions of Law at p.6). A more accurate statement of the applicable legal principle is that there is a common-law principle that the State is ordinarily not subject to its own enactments unless it clearly manifests an intent to be bound by a specific enactment. *Pan American Health Organization v. Montgomery County*, 338 Md. 214, 657 A.2d 1163 (1995). Thus, where the State acquires and uses property for State or public purposes, municipal zoning laws are not applicable to the use, since the General Assembly has neither named the State nor manifested its intention that the State be bound by the provisions of the State Zoning Enabling Act. *Mayor & City Council of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977).

At issue in a nonconforming use determination, as in the case at bar, is the issue of whether the **use** of the property in question was rendered unlawful under the zoning regulations when enacted. *Board of Zoning Appeals of Howard County v. Meyer*, 207 Md. 389, 114 A.2d 626 (1955). Where the evidence establishes that a property owner before and at the time of the adoption of the original zoning ordinance (or subsequent comprehensive rezoning) was using in a then lawful manner for a use which by this legislative action became nonpermitted, the owner has established a lawful nonconforming use. *Id.* The mere change of ownership does destroy a nonconforming use. *Kastendike*, *supra.* Consequently, a use transferred to a successor in interest will continue to be legal. *Id.*

The focus is on whether the **use** at the time of zoning was one which became unpermitted as a result of the legislative action. *BZA v. Meyer, supra.* In this case, the use of the property for a contractor's storage yard became unpermitted by the legislative act of the Baltimore County Council. The **use**, therefore, became nonconforming regardless of the ownership of the property. The evidence established that the **use** of the property continued until the hearing before the Code Enforcement Official. That the City of Baltimore might not have been subject to an action under the zoning ordinance does not in any respect alter the fact that the **use** of the property by the City was nonconforming as to the zoning ordinance.

Under these circumstances, it was error for the Zoning Commissioner to find that the property, and **use** thereof, did not constitute a use nonconforming to the zoning ordinance (regardless of its ownership). His decision in this regard was incorrect as a matter of law and must be overturned.

C. <u>The Amos, Gigliotti and Kubiet, Petitioners lack standing to appear in this proceeding.</u>

The two proceedings before the Code Enforcement Official and the proceeding before the Zoning Commissioner were instituted by Amos and Gigliotti whose properties were opposite to the premises at issue. The testimony has established, however, that both of these objectors have moved to locations where they are not longer specially affected by the operations on the property. As a result they no longer have standing to appear in this proceeding.

A person whose property is far removed from the subject property ordinarily will not be considered a person aggrieved, and therefore has no standing to challenge. *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967). A person whose property is far removed from the subject property ordinarily will not be deemed to have standing unless he or she meets the burden of alleging and proving by competent evidence the fact that his or her personal or property rights are specially and adversely affected by the action or activity complained of. *Sugarloaf Citizens Association v. Department of the Environment*, 103 Md. App. 269, 653 A.2d 506 (1995).

Mere allegations that protestants were citizens "within the area immediately adjacent" to the subject property, without any allegation of special damage, was held insufficient to give protestants standing to challenge. *Lawler v. Bart Realty Corp.*, 241 Md. 405, 216 A.2d 729 (1966). In addition to showing the proximity of one property to the other, facts must be demonstrated of the adverse effect the action complained of has or could have on the use, enjoyment and value of the protestant's property to establish standing. *Wilkinson v. Atkinson*, 242 Md. 231, 218 A.2d 503 (1966).

The evidence establishes that the two original Petitioners have moved to locations removed from the subject property. Gigliotti as of December 2003 moved to 7901 Tilmont Avenue in Parkville, which is on the other side of the county. Amos now resides at 21

Glenwood Avenue, which is one block north of Frederick Road and two blocks east of Mellor Avenue. The subject property is approximately two blocks south of Frederick Avenue. There is no evidence of adverse effect on them different than the public in general. Under these circumstances, neither of them has standing in this case. *Bryniarski, supra; Lawler, supra; Wilkinson, supra.*

Similarly, Louis Kubiet, who was not a party below and who now seeks to become an additional Petitioner, similarly lacks standing to appear in this case. The testimony relating to this individual did not demonstrate that his personal or property rights are specially and adversely affected by the activity complained of. Indeed, the only testimony from this individual related to the existence of the use. There was no testimony that he was specially and adversely affected. The testimony indicated to the contrary – that he could not directly see into the yard of the subject property. In light of the absence of testimony establishing that this individual's personal or property rights are specially and adversely affected by the activities on the property, he lacks standing in this case. *Bryniarski, supra; Sugarloaf Citizens Association, supra; Lawler, supra.*

D. <u>The Petitioners' claims in this proceeding are barred by the doctrine of laches</u>.

The record is clear that Amos, Gigliotti and Kubiet had knowledge of the use of the property since at least 1998, when they brought the first prior action before the Hearing Officer. The proceeding before the Zoning Commissioner, however, was not brought until April of 2003, eight months after the Order in the second Code Enforcement Official's case.

The doctrine of laches is based on the general principles of estoppel and implies that a complaining party has exhibited a lack of due diligence in asserting a right to the detriment of the

defendant. *Jahnigen v. Smith*, 143 Md. App. 547, 795 A.2d 234, certiorari denied, 369 Md. 660, 802 A.2d 439 (2002).

Laches is a defense in equity against stale claims, and is based on grounds of sound public policy by discouraging fusty demands for the peace of society. *Skeen v. McCarthy*, 46 Md. App. 434, 418 A.2d 1214, certiorari denied, 289 Md. 740 (1980).

Generally, to determine the applicable measure of impermissible delay to bar an action the doctrine of laches, if there is no action at law directly analogous to the action in equity, the general three-year statute of limitations will be used as a guideline. *Schaeffer v. Anne Arundel County*, 338 Md. 75, 656 A.2d 751 (1995).

The present proceeding is the fourth to which the property owners have been subjected by Amos and Gigliotti. Twice there has been vindication, in proceedings which clearly and unequivocally determined the property had been used as a contractor's storage yard since at least 1938 and that the use of the property was a nonconforming use. At any time during the four years since the first the determination of the Code Enforcement Official the instant action has been brought. Instead, Amos, Gigliotti and Kubiet stood by as the property was improved and used as a storage yard. The Appellant's reliance on two separate determinations that the use of the property was lawful would redound to its detriment, should the neighbors not now be precluded by laches.

Under the circumstances, Petitioners should be barred by the doctrine of laches from now objecting, years after there existed knowledge of the facts on which this claim is based. The neighbors instead utilized other avenues to halt the use of the property. Those having failed, they now cast about for yet another way to continue the assault on this small property, which continues a use of the property which has existed for at least six and one –half decades. A

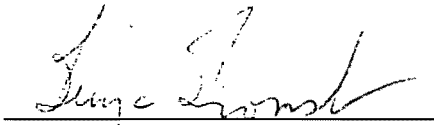
Hundred Years' War there may have been, but principles of equity -- of which laches is one – demand the neighbors' campaign cease after five.

Conclusion

1. Under the principles of law governing the preclusive effect to be given administrative decisions enunciated by the Court of Appeals in *Batson v. Shifflett*, supra, the two prior determinations of the Code Enforcement Official that the property had been used as a contractor's storage since at least 1938, and that therefore the use of the property was a lawful nonconforming use, bar the claims raised by Petitioners in this proceeding.
2. The Petitioners lack standing to appear in this proceeding.
3. The doctrine of laches bars the objectors' claims where they have had knowledge of the facts for four years prior to the institution of the action before the Zoning Commissioner during which the property owner has relied to its detriment on the two previous decisions of the Code Enforcement Official that the use of the property was lawful.

WHEREFORE, Gateway Partners, LLC, Legal Owner and Appellant respectfully requests that the relief sought in its Petition for Special Hearing be reversed and the relief requested in the Special Hearing be dismissed.

Respectfully submitted,



Benjamin Bronstein
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Towson, Maryland 21204
(410) 296-0200

Attorney for Gateway Partners, LLC
Successor Legal Owner

CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on this 27 day of January, 2005, a copy of the foregoing Appellant's Memorandum was mailed, postage pre-paid to Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204 and Peter Max Zimmerman, People's Counsel for Baltimore County, Courthouse, 400 Washington Avenue, Towson, Maryland 21204.

Benjamin Bronstein

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RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

January 28, 2005

Hand Delivered

Ms. Kathleen C. Bianco, Administrator
Board of Appeals for Baltimore County
400 Washington Avenue
Room 49
Towson, Maryland 21204

RE: Case No.: 03-456-SPH

Dear Ms. Bianco:

In reference to the above-entitled case, I am submitting an original and three copies of the Appellant's Memorandum.

Thank you for your kind cooperation and consideration.

Very truly yours,

Benjamin Bronstein

BB/mlh
Enclosure

cc: Peter Max Zimmerman, People's Counsel (with enclosures)
Michael P. Tanczyn, Esquire (with enclosures)

1/28/05

111 Mellor Avenue **N/east side Mellor Avenue,** **1,383 feet south of Frederick Road** **1st Election District - 1st** **Councilmanic District**	* * *	**BEFORE THE** **BOARD OF APPEALS** **OF BALTIMORE COUNTY**
Legal Owner: **D.A. Drenner Concrete, Inc.**	* *	
Petitioners: **Linda J. Amos** **Susanne Gigliotti** **Lewis Kubiet** **Cindy Kubiet**	* * *	**CASE NO.: 03-456-SPH**

RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

* * * * * * * * * * * * *

MEMORANDUM OF PETITIONERS LINDA J. AMOS , SUSANNE GIGLIOTTI, LEWIS KUBIET AND CINDY KUBIET

NOW COMES Petitioners, Linda J. Amos, Susanne Gigliotti, Lewis Kubiet and Cindy Kubiet, by their counsel, Michael P. Tanczyn and submit the within Memorandum to assist the Board of Appeals in answering the questions raised in the Petition For Special Hearing.

STATEMENT OF THE CASE

This Petition was originally brought by Linda Amos and Susanne Gigliotti, who requested, by Special Hearing Petition, that the Zoning Commissioner answer questions raised therein. After hearing and review of the Memos filed by all parties, the Zoning Commissioner, Lawrence E. Schmidt, by Opinion and Order dated September 30, 2003, granted the Petition For Special Hearing, finding: 1) The subject property does not enjoy a valid non-conforming use status as a contractor's equipment storage yard; 2) That Baltimore City's use of the property did constitute an activity which made the property exempt from the Baltimore County Zoning Regulations while so utilized; 3) That Baltimore City's subsequent lease of the property is a proprietary function for remuneration, which made the property subject to the BCZR, beginning with the lease term; and 4) The Zoning

Commissioner/Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a non-conforming use. The property owner at the time, D.A. Drenner Concrete, Inc., filed a timely appeal from that decision to the Board of Appeals for Baltimore County. The matter came on for hearing before the Board of Appeals on December 22, 2004, de novo. At the hearing, the Board of Appeals was presented with motions filed by the Petitioners and the property owner, challenging the standing of the respective parties, to either maintain the Petition or maintain the appeal. The Board was also presented with a motion to add an additional Petitioner, who had participated at the hearing before the Zoning Commissioner, namely Mr. and Mrs. Lewis Kubiet, and the Board granted that motion and denied the motions challenging standing on all sides. Following conclusion of the testimony on December 22, 2004, the Board directed that memorandums be filed with the Board by January 28, 2004, close of business.

FACTS

The testimony and documentary evidence introduced at the hearing held December 22, 2004 before the Board of Appeals showed that this .1921 acre lot comprising 8,368 feet, more or less, located on the east side of Mellor Avenue, and known as 111 Mellor Avenue, was split zoned BM and DR2. By history, the property had been owned beginning February 9, 1925 by the Mayor and City Council (Respondents, Exhibit 4). According to the testimony of Lewis Kubiet, who had resided there for many decades, for many years the property was used as a maintenance yard to house a Baltimore City water department utility truck. The property contained one outdoor building and at least several concrete bins, as was shown on Petitioners' Exhibit 18, showing the City truck in the yard with the old building and the old fence taken from the neighbor's property. In approximately the late 1980's, the City generally stopped using the property, according to Mr.

Kubiet and removed existing materials from the site. Mr. Kubiet recalled the subsequent tenancy of Nicodemus Construction Company at that site under the lease made between Baltimore City and Nicodemus Construction Company, admitted as Petitioners' Exhibit 9, made October 24, 1990, calling for $275.00 a month rent with a month-to-month lease, for use as a carpentry shop and storage of materials. According to Mr. Kubiet, the use of the property by Nicodemus Construction Company was for a carpentry use with the majority of the activity taking place within the building, with very little, if any, outdoor storage by Nicodemus. After a time period of approximately a year, Nicodemus Construction Company vacated the site and it remained vacant until approximately December of 1993 when D.A. Drenner Concrete, Inc. began to use the property under a lease made with the City of Baltimore August 3, 1993 (Petitioners' Exhibit 10), by which Drenner agreed to pay $275.00 a month to use the property for the stated purpose of an office and storage of materials. The testimony of witness, Lewis Kubiet, which was corroborated by proffer by his wife, Cindy Kubiet after she first resided with him, as well as by the other Petitioner witnesses, Linda Amos, who at the time of hearing, resided at 21 Glenwood Avenue, several blocks from this site, as well as Susanne Gigliotti-Johnson, all of whom testified before the Board of Appeals.

Their testimony of the activity on the site when Drenner Concrete used the property was that it had greatly increased, to include large trucks and heavy equipment being operated with back-up alarms early in the morning and late at night, with welding activities conducted on the streets and heavy equipment being brought to the site and stored by Drenner. Their testimony was that Drenner began to move his operation from the property in approximately the spring of 2002, and no later than June of 2002 had vacated the property. The testimony of all the Petitioners' witnesses was that from the time he left, the property remained vacant until recently, in the spring of 2004, after being sold by Deed, May 20, 2004 to Gateway Partners. That Deed was introduced as a preliminary

Petitioners' Motion exhibit, as recorded in the Land Records of Baltimore County, in Liber 20092, folio 8. The testimony of the Petitioners' witnesses indicated that the activity on the property caused noise, substantial vehicular traffic, and dust in the area, causing them to file complaints with Baltimore County, which complaints resulted in the four code violation citations issued for the property and several hearings conducted in those matters under case numbers 98-2180, 99-6305, 00-0836, and 00-1503. The nature of the claimed violations was that the property was being used as a contractor's equipment storage yard, which is not a permitted use in a BM/DR2 zone. Numerous photos were admitted as exhibits in the hearing before the Board of Appeals, including those showing the trucks as utilized by Drenner and the side of the property adjacent to the building in Exhibits 3A through 3D; pictures taken in the fall of 2001, trucks and street activities; 4A through 4P. Photos taken in the winter of 2001 showed a trailer on site and construction in Exhibits 5A through 5F. Photos taken in the fall of 2002, Exhibits 6A and 6B and 7A and 7C, in the summer of 2002, showed that the property was abandoned by Drenner. Petitioners also offered the decision in the zoning reclass case decided in 1954, as Petitioners' Exhibit 8, wherein the request for industrial zoning was turned down and the property was approved for commercial use for the part that is not residential. Additional photos admitted into evidence showed that at the time of the Zoning Commissioner's hearing, in Exhibits 13A through 13C, there was a "For Sale" sign with Long & Foster, for the property, which was abandoned and locked up. Petitioners' Exhibit 14 was a photo taken by a neighbor, Jerry Jett, showing the old building and the old fence at the time when Drenner had operated it in the late 1990s and photos were admitted showing the gates open and the property totally abandoned in April 15, 2004, Petitioners Exhibit 17, as well as pictures taken December 15, 2004, showing the interior of the property, Petitioners' Exhibit 19, indicating the dumpster, Petitioners' Exhibit 20, indicating the rest of the yard in a panoramic collage, and

Petitioners' Exhibit 21, showing the fence. Petitioners' Exhibit 22 all showed the current conditions of the property as of the time of hearing before the Board of Appeals.

Petitioners' Exhibit 11 was the Deed, by which Baltimore City sold the property to D.A. Drenner in March of 2000, for $12,500.00. Petitioners' Exhibit 16 showed the multiple listing for the property as of September 19, 2002, listing the property for sale with Long & Foster, for $190,000.00. Petitioners' Exhibit 23 was the SDAT printout dated December 17, 2004, showing the property had been sold May 20, 2004 to Gateway Partners, by Drenner, by $85,000.00.

All of Petitioners' witnesses testified as to the frequency of their presence in the community and their ability to observe what went on at 111 Mellor Avenue, particularly in the time period after Drenner abandoned the property in June of 2002. Linda Amos testified as to the activity when Drenner was there. She had begun law school in September of 2001 and was studying in Scotland in the spring and early summer of 2002. When she came home the third week of July, 2002, she saw that the lot was cleared, that Drenner had moved out, and that it had stayed the same since then. Susanne Gigliotti-Johnson testified that because of her travel requirements for her job, she would frequently either work from home, as did Ms. Amos on occasion, or after travel, would come home and could observe what went on at 111 Mellor Avenue. She testified that from June of 2002, Drenner had moved from the property, and that the property remained vacant and unutilized, based on her frequent observations, until she moved from the neighborhood in 2004. Mr. Lewis Kubiet who was an office manager for the Internal Revenue Service testified that he would frequently stop by his home or work from his home, on occasion, and that he had frequent observations concerning 111 Mellor Avenue. He testified that after Drenner left sometime in June, 2002, that the property remained unused and abandoned until some time late in May of 2004. The pictures taken April 15,

2004 were corroborated by him, as well as the other photographs which he was shown, and which were introduced through him.

The only witness called by the Respondent, Gateway Partners, LLC, was Wayne Odachowski. He testified that he was a principal in Gateway Partners, LLC, which was in the business of development, insurance restoration work, which he described as rehabilitation and restoration of commercial properties, for the last 10 years. He testified after he completed college, he spent 15 years in the investment business, and the last 10 years working in the manner described, with Gateway Partners, LLC.

He stated that he had purchased the property April 9, 2004 and he had first looked at the property approximately 6 to 9 months before that. He was told that the property had been used as a contractor's equipment yard. He testified that a trailer shell onsite had concrete materials and small amounts of rebar or wood and safety fence stored in the garage. He testified that he, if allowed, hopes to use the property to store a flat utility trailer and a bobcat, and he does not intend to store heavy equipment at the site. He testified he has another site where he stores other equipment and his big equipment at another Ocean City site. He testified to the presence on the site of small amounts of rebar, lumber, steel mesh and safety fence. He testified that in the bins, he believed there were small amounts of aggregate, which he suspects were left over from Drenner's use. He did not recall whether the gate had been opened before he purchased it, and he was aware of the pending zoning case, because of the Board of Appeals sign and conversations he had with Darryl Drenner. He had not reviewed the Zoning Commissioner's Decision of September 30, 2003. He testified he has invested in real estate. He testified he did not research the zoning history of the site, or even the history of this case, and he was aware of the split zoning on the property, and was aware that a contractor's equipment storage yard was not a permitted use at this site under the

present zoning. Respondent's other exhibits introduced at the Board of Appeals from the hearing below included the listing contract of September 15, 2002 for $190,000.00, Respondent's Exhibit 1, a copy of the Code Enforcement Hearing Officer's Opinion in Case 00-1503, issued August 5, 2002, Respondent's Exhibit 2, a final Order of the Code Hearing Officer November 4, 1998, in Case 98-2180, Respondent's Exhibit 3, a Notice of Fixed Capital Record for the Catonsville storage yard, noting it was not rented, Respondent's Exhibit 5, a letter dated March 6, 1986 from Howard Chertkoff, soliciting the property from the Department of Public Works of Baltimore City, Respondent's Exhibit 6A and the reply from the Public Works Department, March 14, 1986, saying they had no plans to discontinue the yard at that time, Exhibit 6B. Respondent's Exhibit 7 was a copy of Petitioners' Memorandum to the Zoning Commissioner in this case, and Respondent's Exhibit 8 was a SDAT real property search for 108 Mellor Avenue, indicating it was sold by Susanne Gigliotti February 4, 2004, and Respondent's Exhibit 9, real property search for 110 Mellor Avenue, indicating it was sold by Stephen Amos on September 21, 2004.

People's Counsel presented one Exhibit, zoning history submitted by agreement and with the approval of the Board, after the hearing concluded December 22, 2004. That zoning history signed by W. Carl Richards, Jr. of the Baltimore County Office of Zoning indicates that the property was shown as split-zoned, BM/DR2 for the 2004, 1971 and 1960 Comprehensive Zoning Maps. It further shows that on the 1945 Zoning Maps, case 2800 was superimposed by which industrial zoning was denied to the site by Order of the Zoning Commissioner, February 5, 1954. In that Order, the property was re-zoned from A-residential to E-commercial. The case extended the zoning line about 50 to 60 feet south of the current BM/DR2 zone line.

ISSUE ONE

FOR WHAT PERIOD OF TIME WAS THE PROPERTY 111 MELLOR

AVENUE EXEMPT FROM COMPLIANCE WITH BALTIMORE COUNTY ZONING REGULATIONS (BCZR) DURING ITS OWNERSHIP BY BALTIMORE CITY?

THE PROPERTY WAS EXEMPT FROM BCZR WHILE OWNED BY BALTIMORE CITY FROM THE EFFECTIVE DATE OF ZONING IN 1945 UNTIL THE CITY STOPPED USING THE PROPERTY FOR A GOVERNMENTAL FUNCTION WHICH OCCURRED SOMETIME IN 1987 OR 1988; OR AT THE LATEST WHEN THE CITY ENTERED INTO A LEASE WITH NICODEMUS CONSTRUCTION FOR THE STATED PROPRIETARY USE AS "A CARPENTRY SHOP AND STORAGE OF MATERIALS" ON OCTOBER 24, 1990 WITH A START DATE OF NOVEMBER 1, 1990.

The BCZR define non-conforming use in §101 as "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use (Bill No. 18-1976)" Non-conforming uses are regulated under provisions of BCZR 104.1, which allows non-conforming uses to continue unless any of the following circumstances occur:

1. change from non-conforming use to any other use whatsoever; or
2. abandonment of non-conforming use for one year or more; or
3. discontinuance of non-conforming use for one year or more.

If any of these are met, BCZR 104.1 states the non-conforming use shall terminate.

Maryland Courts have consistently espoused as a general and well established policy against the expansion of non-conforming use and favored strict construction of local ordinances and regulations "to effectuate the purpose of eliminating non conforming use". Trip Associates Inc. v. Mayor & City Council of Baltimore, 151 Md. App. 167, 824 A2d 977 @ 982 (2003). Citing County Council v. Gardner, Inc., 293 Md. 259, 268 (1982) Colati v. Jerout, 186 Md. 652, 655 (1946).

In this case, due to the City's ownership of the property purchased in 1925 until sold by deed March 10, 2000 to D.A. Drenner Concrete, Inc. for $12,500, the threshold issue of an exemption period from the BCZR due Baltimore City is presented. Baltimore City is exempt from the BCZR

when enacted into law, so long as it is utilizing the property for a governmental function; but it is subject to such restrictions when it is engaged in a proprietary function. American Law of Zoning §9.03.

Maryland follows that doctrine. In Youngstown Cartage Company v. North Point Peninsula Community Coordinating Council, et al., 24 Md. App. 624 - 631 332 A2d 718, 84 ALR 3d 1181 (1975), the Maryland Court of Special Appeals held that

> "When the State acquires land and then leases or rents that land to a private person or concern for a private use, the land is subject to local zoning ordinances or regulations so long as it is so leased or rented."

The State had acquired land in Baltimore County for its tunnel project. Because it had no immediate use for the property, the State leased the entire 2 acre tract to Youngstown Cartage for a trucking terminal. When Baltimore County received a zoning complaint about that use it initiated proceedings. After hearing, the DZC held that BCZR applied to the leased lands.

On appeal the Board of Appeals rejected the State's view that the Board had no jurisdiction because the State owned the land and decided the case adversely to Appellant. The Circuit Court affirmed the Board holding.

> "There is no question that the property, although State owned, is being used for private enterprise via a landlord-tenant relationship. No public use is being made of this property, therefore, it must be zoned in accordance with the zoning regulations before private use may be made of it. Id @ 627.

In affirming the Circuit Court, the Court of Special Appeals rejected the State's ownership argument "because the land in the case now before us is not put to the public use." Id @ 628-630, tracing the definition in caselaw of public use.

Applying that holding to the facts established in this case, the Mayor and City Council's lease with either Nicodemus Construction in 1990 or Drenner in August, 1993 would subject the

property to the BCZR which never allowed contractor's equipment storage yards as a permitted use or use by special exception in the zoning for the site at those times.

Further, by the residents' testimony, the City ceased using the property for a utility yard sometime in 1987 or 1988 which is after the time period in which letters were exchanged in 1986 (Drenner, Exhibit 6A, 6B).

ISSUE TWO

DOES 111 MELLOR AVENUE ENJOY A VALID NON-CONFORMING STATUS AS A CONTRACTOR'S EQUIPMENT YARD?

NO, IT DOES NOT AND IT IS UNDISPUTED THAT NO PETITION FOR SPECIAL HEARING WAS EVER FILED BY THE PROPERTY OWNER REQUESTING THE ZONING COMMISSIONER FIND A VALID NON-CONFORMING USE EXISTS. FURTHER, THE CHANGE OF USE WITH THE NICODEMUS LEASE FOR A CARPENTER SHOP PERMITTED IN A BM ZONE MARKS THE ABANDONMENT OF THE NON-CONFORMING USE WITH THE USE OF THE PROPERTY FOR A PERMITTED USE. FURTHER, THE DISCONTINUANCE OF THE ALLEGED NON-CONFORMING USE FOR PERIODS OF TIME IN EXCESS OF ONE YEAR PRIOR TO THE NICODEMUS LEASE; NAMELY THE 18 MONTH PERIOD BETWEEN THE NICODEMUS LEASE END AND THE DRENNER LEASE, WHEN THE PROPERTY WAS VACANT AND UNUSED, AND FROM JUNE, 2002, WHEN DRENNER VACATED THE PREMISES THROUGH SOME TIME IN MAY, 2004, WHEN IT WAS VACANT AND UNUSED, PROVIDE A MULTITUDE OF EXAMPLES OF DISCONTINUANCE AND ABANDONMENT OF USE, WHICH TERMINATES A NON-CONFORMING USE, UNDER BCZR 104.1.

As was noted in the Zoning Commissioner's Findings of Fact And Conclusions of Law, Baltimore County is a Charter County, pursuant to the provisions of Article 25A of the Annotated Code of Maryland. The Charter was adopted by the voters of Baltimore County November 6, 1956. The Charter establishes the structure of County government and Section 522 thereof establishes the Office of the Zoning Commissioner.

The authority of the Zoning Commissioner is set forth in the 2003 Baltimore County Code. Sections 3-2-1103, 3-2-1201, 3-2-1203, 32-1-102 thereof sets out the method of appointment of the Zoning Commissioner. Baltimore County Code 2003, Sections 32-3-301 provides for the authority

of the Zoning Commissioner. It is also to be noted that Sections 32-3-102, 32-3-601, 32-3-605 of the Code establishes the process for zoning violations. Those Sections also provide that the Director of the Department of Permits and Development Management shall interpret and enforce the County's zoning regulations. Indeed, Code Hearing Officer Shapiro's office and authority is founded upon that Section. The BCZR also established the authority of the Office of the Zoning Commissioner. BCZR §500.7 empowers the Zoning Commission to conduct a hearing to determine the existence of any purported non-conforming use on any premises. That was never done, and so no valid non-conforming use can exist without that. The property owner's reliance on decisions rendered by Stanley J. Schapiro as Code Enforcement Hearing Officer in cases 98-2180 and 00-1503 regarding 111 Mellor Avenue are unavailing for several reasons.

First, the Code Enforcement Hearing Officer's position, created by 1992 legislation, has no authority to grant a non-conforming use. The Zoning Commissioner, a charter office, alone possesses that power.

Second, Baltimore County has recognized the lack of jurisdiction of the Code Enforcement Hearing Officer by requiring code enforcement complaint respondents who claimed a non-conforming use to Petition the Zoning Commission by Special Hearing to seek a non-conforming use determination. The Code Enforcement action would be routinely stayed to allow that to occur. Perhaps because of the friendship between Benjamin Bronstein (Drenner's attorney) and Stanley Schapiro, that policy was not followed in those cases where Mr. Schapiro dismissed the Complaints. For anyone who believes the law should be applied equally to all subject to it, Mr. Schapiro's decisions are impossible to reconcile.

ISSUE THREE

DOES THE DOCTRINE OF "RES JUDICATA", BASED ON THE CODE ENFORCEMENT HEARING OFFICER STANLEY SCHAPIRO'S DECISION IN

THE CODE ENFORCEMENT CASE 98-2180 AND 00-1503 APPLY AS A BASIS TO DISMISS THE RESIDENTS INSTANT SPECIAL HEARING PETITION?

NO, FOR A VARIETY OF REASONS.

First, Mr. Schapiro, as Code Enforcement Hearing Officer, had no authority to grant a non-conforming use or make that determination. Only the Zoning Commissioner has that authority, under the code sections previously cited. Second, Mr. Schapiro was wrong on the law and the facts applicable to this case. Third, when acquainted with additional facts in the later case, Mr. Schapiro failed to make findings of fact to address the matters of record, including proprietary leases, abandonment of use, and discontinuance of use. It is clear from Appellate Court decisions, that the doctrine of res judicata/Issue Preclusion is sparingly applied to decisions of administrative bodies.

The Court of Special Appeals in Board of County Commissioners of Cecil County v. Racine, 24 Md. App. 435, 332 A2d 306 (1975) concluded its opinion rejecting the application of "res judicata" in that case as follows:

> "Mistaken interpretations of law, however honestly arrived at are held not to be within the exercise of sound administrative discretion and the legislative prerogative, but to be arbitrary and illegal. Perpetuation of illegality by an administrative body by inflexible application of the principle of res judicata is impermissible."

Petitioners adopt the argument from the previous issue, establishing that Stanley Schapiro had no jurisdiction or authority to find the non-conforming use or to make a determination after Special Hearing, for reasons cited and incorporated herein without repetition. Second, Mr. Schapiro erred both as to the law and the facts invoking, at the urging of Drenner's counsel, the doctrine of res judicata in this matter. In determining whether res judicata should be properly applied in this case, the decision of the Court of Appeals in MPC, Inc. v. Billy Kenny, 279 Md. 29, 367 A.2d 486 (1977) is instructive.

> "The doctrine of res judicata is that a judgment between the same parties and [367 A.2d 489} their privies is a final bar to any other

> suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit...." (Emphasis added).
>
> "The delineation between res judicata and collateral estoppel was expressed in Sterling v. Local 438, 207 Md. 132, 140-41, 113 A.2d 389, 393, cert. denied, 350 U.S. 875, 76 S.Ct. 119, 100 L.Ed. 773 (1955):"
>
> "... If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated (res judicata). If, in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case (collateral estoppel)." (citation omitted) Id. @ 32

The Court set forth, as followed in Maryland, as to whether the same evidentiary facts would sustain both actions.

> "The measure which seems to find favor with most courts, and one which we have applied, is whether the same evidentiary facts would sustain both actions. Id. @ 33

The fallacy of invoking res judicata in this matter, as was done by the Code Enforcement Hearing Officer, Mr. Schapiro is the same reason why the Board of Appeals should reject the request that they apply that doctrine to dismiss the instant Special Hearing position.

> "The basic rule of res judicata is that facts or questions which were in issue in a previous action and were therein determined by a court which had jurisdiction of the parties and the subject matter are conclusively settled by a final judgment in the first case and may not again be litigated in a subsequent action between the same parties or their privies even though the subsequent suit takes a different form or is based on a different cause of action."
>
> "There is substantial authority that the doctrine of res judicata itself should not be rigidly applied where the prior judgment or decree was the product of error of law. In 46 Am.Jur.2d, Judgments, s 416, it is said:

"There are cases stating that the doctrine precluding the relitigation of issues previously adjudicated in an action on a different cause of action, is confined to issues of fact or, at least, to mixed questions of fact or law, and thereby excluding questions of law from the operation of the doctrine. Under this rule, the doctrine does not extend to erroneous propositions of law applied by the court in reaching its decision."

"An analogous rule is announced in Restatement of the Law of Judgments, s 70, at 318, where it is said:

"Where a questions of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result."

"In comment f. of the above quoted Restatement rule it is said at 324:"

"Where injustice would result. The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons." (Italics supplied.) Id.@ 447-448 ...If, as here, the court rendering the earlier judgment had jurisdiction of the parties and the subject matter, the fact that its final judgment was erroneous or irregular will not prevent that judgment from acting as a bar to a relitigation of the cause of action which was merged in the judgment." (Italics supplied.)

"Should such an inflexible rule of law be made applicable to errors of law by administrative bodies? We think not."

"We recognize, as indeed we must, that an unreversed final decision by a zoning board, passed in the exercise of its discretion upon issues of fact or upon mixed issues of law and fact are fully binding upon the parties to the cause and their privies as to all issues determined thereby. It is only when there has been a substantial change of conditions or it is shown that the decision was the product of fraud, surprise, mistake, or inadvertence, that such an administrative body may reverse its prior decision in litigation between the same parties. Whittle v. Board of Appeals, supra;

Woodlawn Assn. v. Board, supra; Gaywood Association v. MTA, 246 Md. 93, 227 A.2d 735. Id. 450, 451.

A property owner may not defend against a code violation citation by asserting the existence of a non-conforming use. BCZR 500.7 provides the special hearing as the explicit and exclusive remedy for a property owner to establish or legitimize such a use. When proceeding, under BCZR 500.7, the burden is on the property owner affirmatively to establish the existence of the non-conforming use. It should be significant to the Board of Appeals that there was not one shred of testimony from the Respondent in this case to affirmatively establish the elements of a continuous uninterrupted non-conforming use at this site, or to satisfactorily deal with facts present, which suggest, under BCZR 104.1, not only extensive and numerous abandonments of the non-conforming use, but also change to a permitted use with the lease for the carpentry shop. The Respondent's presentation suggested a claimed non-conforming use status as a vested right to be disproven by the Petitioners in this case, which is not in accord with the requirements of BCZR 500.7 or 104.1, which places the burden of proof on the property owner, to affirmatively establish the continuous existence of a valid non-conforming use.

In examining Mr. Schapiro's decisions in citation 98-2180 and 00-1503, it becomes clear that the parties are not the same, since Baltimore County was the instigating party in that case. Secondly, Mr. Schapiro had no jurisdiction to decide non-conforming uses. He acted against the long standing policy invoked by him in similar cases with other Respondents who claimed a non-conforming use, by not requiring Drenner to petition, by Special Hearing, and staying the Code Enforcement action pending receipt of a final decision from the Zoning Commissioner on the non-conforming use status. His decision in 98-2180 makes findings only that the City owned the property since 1923, in the deed, citing a City exhibit. While the deed in the present case indicates

the City bought the property in 1925, in that decision there is no mention of the lease from the City to Nicodemus Construction or the purposes for the lease, nor were either of the leases between the City and Nicodemus or Drenner presented to the Code Enforcement Hearing Officer. Most importantly, in the second last paragraph of that decision, he makes a finding of a non-conforming use, without using those words and on that basis, then says, "based on the uncontradicted, the Respondents should be dismissed." Ignoring the fact that that is gibberish, in fact he had no jurisdiction or authority to make such a determination, and the County policy followed by Mr. Schapiro in other cases was not to make that determination, but to properly defer to the code position of Zoning Commissioner, which has authority, under BCZR §500.7 to conduct those hearings and make those determinations. In his decision in code enforcement case 00-1503, again he finds that the Respondent's use of the property for a contractor's storage yard, "which is not a permitted use of right in an FM zone" makes and misstates the size of the property as .5 acres and that "some of the neighbors said the property was not used as a contractor's storage yard for a period of time." Again there is no mention of the leases between the City and Nicodemus or Drenner, and neither a discussion nor a decision concerning the City's exemption from the BCZR and loss of that exemption when the property was leased for a proprietary or non-governmental purpose through Nicodemus and Drenner.

Upon analysis, the effect of Mr. Schapiro's decisions in both cases were to protect the proprietary use of the property, illegally, as a contractor's equipment storage yard, under a finding of non-conforming use, which Mr. Schapiro had no jurisdiction or authority to find as a matter of law. Those decisions cumulatively have the effect of continuing to visit upon the residents of the community, even more intense activity on the part of Drenner Concrete, it's equipment and

03-456-SPH

People's Counsel Exhibits

#1 Letter dtd 1-20-05 from PC — attachment:
Memo dtd 1/19/05 from C. Richards w/ attached maps

Recvd 1/21/05

Baltimore County, Maryland
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PETER MAX ZIMMERMAN
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January 20, 2005

Lawrence S. Wescott, Panel Chairman
County Board of Appeals
400 Washington Avenue, Room 49
Towson, Maryland 21204

Re: D.A. Drenner Concrete, Inc
111 Mellor Avenue
Case No.: 03-456-SPH

Dear Mr. Wescott:

Enclosed please find a copy of the January 19, 2005 inter-office memorandum with attached maps from W. Carl Richards, Zoning Supervisor of PDM, concerning the zoning history of this case. Please mark this memorandum as People's Counsel Exhibit 1, per the agreement that this information would be provided after the hearing concluded. It appears to show that the property has been split-zoned commercial and residential at least since 1960.

Thank you for your anticipated consideration.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

PMZ/rmw

Enclosures

cc: Michael Tancyzn, Esquire
Benjamin Bronstein, Esquire
W. Carl Richards, Zoning Supervisor (w/o attachments)

RECEIVED
JAN 20 2005
BALTIMORE COUNTY
BOARD OF APPEALS

PC #1

BALTIMORE COUNTY, MARYLAND
Interoffice Memorandum

DATE JANUARY 19, 2005

TO: PETER MAX ZIMMERMAN, PEOPLE'S COUNSEL

FROM: W. CARL RICHARDS, JR., ZONING SUPERVISOR WCR

SUBJECT: CASE # 03-456-SPH (D.A. DRENNER CONCRETE, INC., 111 MELLOR AVENUE)

IN RESPONSE TO YOUR 12/27/04 MEMO REGARDING THE ZONING HISTORY OF THE ABOVE LOCATION, PLEASE BE ADVISED THAT THE PROPERTY WAS SHOWN SPLIT-ZONED ON THE 2004,2000,1971, AND 1960 ZONING MAPS. ON THE 1945 ZONING MAP CASE # 2800 IS REFERENCED THIS CASE DENIED INDUSTRIAL ZONING AND GRANTED ON 2/5/54 A-RESIDENCE TO E-COMMERICAL. THIS CASE EXTENDED ABOUT 50 FEET TO 60 FEET SOUTH OF THE CURRENT BM/DR-2 ZONE LINE.

PC #1

employees at early hours of the morning through late hours at night, by perpetuating an illegal non-conforming use at the site.

Third, Mr. Schapiro failed to take cognizance of the statue with regard to discontinuance of use or abandonment of use, either of which would have been bases of which to make a proper finding that a non-conforming use could not have applied to this site on the facts applicable to this case. McKemy v. Baltimore County, 39 Md. App. 257, 385 A.2d 96 (1998) In applying the McKemy holding to the facts of this case, the use made by the City for a single vehicle used to take care of water distribution lines with a shed for storage of materials and several open bins should be contrasted with the tremendous expansion of the property use by activity amount and number of pieces of equipment, as utilized by Drenner Concrete. The McKemy court stated that a proper determination of §104.1 of the Baltimore County non-conforming use regulations would have required:

> "In deciding whether the current activity is in the scope of the non-conforming use, the Board should have considered the following factors:
>
> 1. To what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use?"

In the instant case, the use at the time of Nicodemus as a carpentry shop and storage of materials, which was done inside the shed, was a permitted use in a commercial zone and the use by Nicodemus for a permitted use would, under operative law, have terminated the non-conforming use, once the property was then used in a manner and use called for under the statute.

> 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?"

As to that factor, the testimony regarding the City's use of the property was that it was used for storage of materials and parking of a truck. In Drenner's case, many more pieces of equipment

and trucks were there, maintenance was done on the trucks and manufacturing activity, such as cutting up rebar or concrete forms was being done by Drenner during his time at the property. Prior to his utilization of the property, Nicodemus had used the property for storage of carpentry materials and not for parking any vehicles at the site, for the time period of his proprietary lease.

3. "Does the current use have a substantially different effect upon the neighborhood?"

Based on the testimony of the residents, the hours of operation had greatly expanded the area of the site which was utilized and the number and amount of equipment utilized by Drenner, as well as the activities taking place, cutting up rebar, running backhoes up and down Mellor Avenue, with back-up alarms going off in the wee hours of the morning until late at night, would have a substantially different effect, as testified to by the neighbors.

4. "Is the current use a drastic enlargement or extension of the original non-conforming use?"

Again, the City had one truck there next to a shed building and with open bins. The use by Drenner was greatly expanded, and would constitute, under the Court of Special Appeals test, a drastic enlargement or extension of the original non-conforming use beyond that permitted by law. Further, there was ample testimony before the Board of Appeals in the instant case, not only of a change to a use as a carpenter shop by Nicodemus under its lease, but periods of abandonment by Drenner, going back to more than a year prior to the time of hearing in this case. The testimony was that Drenner had moved from the site in June of 2002, except for one or two pieces of equipment kept at the property, which had been subsequently removed from the site. The residents testified as to abandonment of this site by Drenner when he purchased, in April or May of 2002, other land in Jessup, Maryland, where he has operated his business since he moved from this site in June of 2002.

Therefore, there are numerous factors on which the Board of Appeals, in the instant case can, and should, conclude the following:

1. That the property does not enjoy and never did enjoy a valid non-conforming use.

2. That when Nicodemus construction leased the property for a carpentry shop and storage of related materials, that was a permitted use under the BM zone and that, in and of itself, would have terminated any claim of non-conforming use.

3. That Drenner's lease stated the property was to be used for office use and storage of materials. It mentions nothing of perpetuation of a contractor's equipment storage yard as a permitted use under the lease. Other provisions of the lease, which may be seen as boilerplate call for operation of the property by use in accordance with the law. The law prohibited the use at all times, which Mr. Drenner used the property for in a BM or a DR2 zone.

4. The doctrine of res judicata has no application in this case. Code Enforcement Officer Schapiro had no authority to make a non-conforming use determination. Under those circumstances, the doctrine of res judicata has no application in this matter.

5. That the abandonment of the premises for the time periods of more than a year between the Nicodemus and the Drenner lease; from June, 2002 through late May, 2004; and Baltimore City's abandonment of the use of the property as a storage yard for several years in the late eighties, prior to the Nicodemus lease all provide independently sufficient examples of abandonment under BCZR 104.1 to terminate the non-conforming use.

CONCLUSION

For the foregoing reasons and authorities Petitioners request that the Board of Appeals answer the questions asked in the Special Hearing Petition as follows:

1. For what period of time was the property, 111 Mellor Avenue exempt from

compliance with Baltimore County Zoning Regulations (BCZR) during its ownership by Baltimore City?

That the City enjoyed an exemption until Nicodemus Construction rented the property in 1990. Thereafter the property became used for a permitted purpose under BM zone and any claim of non-conforming use would have terminated for that reason; or because of the abandonment or discontinuance of the use by subsequent tenant and owner, Drenner Concrete. Further, Drenner Concrete's lease called for use of the property as an office and storage of materials and for use of the property, in accordance with law, which also would have terminated any claim of non-conforming use.

2. Does 111 Mellor Avenue enjoy a valid non-conforming status as a contractor's equipment yard?

No.

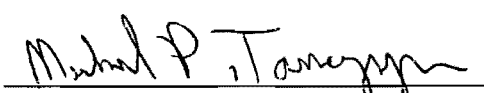
3. Does the doctrine of res judicata, based on the Code Enforcement Hearing Officer Stanley Schapiro's decision in the Code Enforcement Case 98-2780 and 00-1503 apply as a basis to dismiss the residents instant Special Hearing Petition?

No, for a variety of reasons.

4. Does the Zoning Commissioner solely have authority, under Baltimore County Charter and Code, and particularly BCZR 500.7, to make determinations of non-conforming use, the exercise of the Zoning Commissioner's charter power to interpret the zoning regulations.

Yes.

Respectfully submitted,



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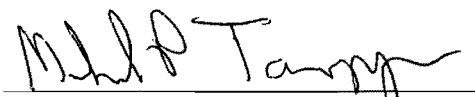
Towson, Maryland 21204

(410) 296-8823
Attorney for the Petitioners,
Linda Amos, Susanne Gigliotti-Johnson, Lewis Kubiet and
Cindy Kubiet

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 28th day of January, 2005, , a copy of the foregoing Memorandum of Petitioners Linda J. Amos, Susanne Gigliotti-Johnson, Lewis Kubiet, and Cindy Kubiet, was mailed to Peter Max Zimmerman, Esquire, Peoples' Counsel for Baltimore County, Room 47, 400 Washington Avenue, Towson, Maryland 21204 and to Benjamin Bronstein, Esquire, Ste. 205, 29 W. Susquehanna Avenue, Towson, Maryland 21204-5218, Attorney for Gateway Partners, LLC, Respondent.



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January 28, 2005

RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

County Board of Appeals of Baltimore County
Attn: Ms. Kathy Bianco
Old Courthouse, Room 49
400 Washington Avenue
Towson, MD 21204

Re: Petition of Susanne Gigliotti, Linda Amos, and Mr. and Mrs. Lewis Kubiet
Case No.: 03-456
111 Mellor Avenue, Catonsville, Maryland 21228

Dear Ms. Bianco

Pursuant to direction from the Board of Appeals, we enclose an original and three (3) copies of the Petitioners' Memorandum for filing in this case. I also enclose a courtesy copy of the Motion to Add Petitioner, by which Lewis Kubiet and Cindy Kubiet, who reside at 116 Mellor Avenue, Catonsville, Maryland 21228, were added as Petitioners to this case by verbal order announced by the Chairman of the Board of Appeals for the panel hearing the case on December 22, 2004.

Thank you for your assistance in filing this Memo.

Very truly yours,

Michael P. Tanczyn, Esquire

MPT/cbl

cc: clients
Benjamin Bronstein, Esquire
Peter Max Zimmerman, Esquire

12/22/04

111 Mellor Avenue	*	**BEFORE THE**
N/east side Mellor Avenue,		
1,383 feet south of Frederick Road	*	**BOARD OF APPEALS**
1st Election District - 1st		
Councilmanic District	*	**OF BALTIMORE COUNTY**
Legal Owner:	*	
D.A. Drenner Concrete, Inc.		
	*	
Petitioners:		
Linda J. Amos and	*	
Susanne Gigliotti		**CASE NO.: 03-456-SPH**
	*	

* * * * * * * * * * * * *

MOTION TO ADD PETITIONER

The Petitioners herein wish to add as additional Petitioners, Lewis Kubiet and Cindy Kubiet, who reside at 116 Mellor Avenue, Catonsville, Maryland 21228.

RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

Respectfully submitted,

MICHAEL P. TANCZYN, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204
(410) 296-8823
Attorney for the Petitioners,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 22nd day of December, 2004, a copy of the foregoing Motion to Add Petitioner was hand-delivered to Peter Max Zimmerman, Esquire, Peoples' Counsel for Baltimore County, Room 47, 400 Washington Avenue, Towson, Maryland 21204 and to Benjamin

Bronstein, Esquire, Ste. 205, 29 W. Susquehanna Avenue, Towson, Maryland 21204-5218, Attorney for Darryl A. Drenner Concrete, Inc.

MICHAEL P. TANCZYN, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204
(410) 296-8823
Attorney for the Petitioners

12/22/04

RE: PETITION FOR SPECIAL HEARING NE/S Mellor Avenue; 1,383' S of c/l Frederick Road (111 Mellor Avenue)	*	BEFORE THE COUNTY BOARD
1st Election District, 1st Councilmanic District	*	OF APPEALS
Legal Owner(s): D.A. Drenner Concrete, Inc Contract Purchaser(s): Linda J Amos & Susanne Gigliotti	* *	FOR BALTIMORE COUNTY
Petitioners		
	*	Case No. 03-456-SPH

* * * * * * * * * * * *

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY'S HEARING MEMORANDUM

Introduction

Upon review of the record, it is in the public interest to address the procedural and substantive issues raised in this case concerning the viability, as a nonconforming use, of a contractor's (or construction) equipment storage yard on property zoned B.M (Business-Major) and D.R. 2 (Density Residential – maximum 2 units per acre) in Catonsville. People's Counsel is interested to defend the comprehensive maps and law. People's Counsel v. Maryland Marine 316 Md. 491 (1989); People's Counsel v. Crown Dev. Corp. 328 Md. 303 (1992); Sycamore Realty v. People's Counsel 344 Md. 57 (1996); Marzullo v. Kahl 360 Md. 158 (2002).

To begin with, this use is allowed by special exception in the B.R. (Business Roadside) zone, BCZR 236.4; by right in the M.L. (Manufacturing-Local) zone, BCZR 253.1.B.3; and by right subject to setbacks in the M.H. (Manufacturing-Heavy) under the other manufacturing use category, BCZR 256.3. It is not permitted by right or special exception in the B.M. or D.R. 2 zones. BCZR 233, 1B01. Therefore, it is prohibited. BCZR 102.1; Kowalski v. Lamar 25 Md. App. 493, 498-99 (1975).

Baltimore County first enacted a comprehensive set of zoning regulations and maps in 1945. See Kahl v. Consolidated Gas & Electric Co. 191 Md. 249 (1948). The then County

Commissioners passed a new set of laws in 1955, and there have been amendments of varying scope and type thereafter. The source of the three main Business Zones is the 1955 law. The source of the D.R. zones is Bill 100, 1970, which amended a different set of zones based primarily on minimum lot size and type of use.

A "Nonconforming Use" is defined under BCZR 101, in pertinent part, as a "Legal use that does not conform to a use regulation for the zone in which it is located ...." BCZR 104, also derived from the 1955 BCZR, as amended, sets the parameters for nonconforming uses, including the occasions for termination of such uses. BCZR 104.1. The Court of Appeals has emphasized that zoning laws anticipate the eventual disappearance of nonconforming uses because they are by nature incompatible with the zones in which they are situated. The law, however, considers them to be vested until they are changed, abandoned, or discontinued. The law does not favor nonconforming uses, and the law must be interpreted in that light. Prince George's County v. E.L. Gardner,Inc. 293 Md. 259 (1982).

Questions Presented

The Zoning Commissioner's September 30, 2003 opinion and order posits two questions, which we anticipate will reappear at the upcoming *de novo* County Board of Appeals hearing. We rephrase and renumber these questions as follows:

1. Does the Baltimore County Code Enforcement Official have authority to determine the existence of a nonconforming use, and if so, does his decision have preclusive (or *res judicata*) effect in a petition for special hearing?
2. Is the use of Baltimore County property by Baltimore City or its tenant exempt from Baltimore County Zoning Regulations?
3. Whether there was ever any nonconforming use, and, if so, has it terminated by change or discontinuance under BCZR 104?

Relevant Zoning Regulations

BCZR 101: "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use."

BCZR 104.1: "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."

Statement of Facts

We will assume the facts are as stated in the ZC opinion. If the evidence shows material differences, we reserve the right to take them into account.

The City of Baltimore owned the property from 1925 until March, 2000. The original use was for maintenance of City utility trucks. In the late 1980s (1987/1988), the City's use ended. According to the ZC opinion, evidence showed this use to be modest, with little impact on the surrounding residential neighborhood. It also appears that there was no use of the site for one or two years after the City discontinued its operations.

In October, 1990, the City leased the property to Nicodemus Construction Company for a carpentry shop and to store materials. Nicodemus made minimal use of the site, with mostly indoor activity. A few years later, Nicodemus left, although the opinion is silent as to precisely when.

In December, 1993, the City leased the property to D.A. Drenner Concrete, Inc. to use the property as an office and for storage of materials. Initially, the main use was for storage. Between 1995 and 2000, however, the activity increased. This led to objections by neighbors because of noise, dust, and traffic, and to the filing of zoning complaints resulting in four citations between 1998 and 2000. In two of these cases, the Hearing officer declined to find any

violation because he ruled that the property enjoyed a nonconforming use as a contractor's equipment storage yard since 1938.

In March, 2000, the City sold the property to Drenner. But, in 2002, about a year before the September, 2003 opinion, Drenner moved its operation and vacated the site. It is unclear what use has been made of the site between the middle of 2002 and now, at the end of 2004.

In 2003, various neighbors filed a petition for special hearing to determine the status of the property and the legality or viability of any nonconforming use. The Zoning Commissioner ultimately determined that the use had terminated by discontinuance. The property owners appealed.

Argument

I. A Hearing Officer Decision in a Violation Case Does Not Preclusive Effect Here

The responsibility for determination of the legal existence of a nonconforming use rests with the Zoning Commissioner under BCZR 500.7. This establishes the authority and function to hold a special hearing to resolve this and other legal issues.

A property owner may not defend against a violation citation by asserting the existence of a nonconforming use. Rather, BCZR 500.7 provides the special hearing as the explicit and exclusive remedy for a property owner to establish or legitimize such a use. In this context, the Zoning Commissioner, having been designated to exercise this statutory authority, came to the reasonable conclusion that an equivalent determination by the Hearing Officer in a violation case would frustrate the legislative purpose.

Even if the Hearing Officer could properly consider the nonconforming use defense, as the Officer did here, we are convinced that his ruling in favor of the property owner is not preclusive. Code enforcement is governed by Secs. 3-6-201, et seq. of the County Code (2003).

The parties in the violation case are Baltimore County, a body corporate and politic, and the property owner. The county law office and code inspectors prosecute enforcement. Neighboring citizens are not listed as parties. They could possibly be witnesses, but they do not appear as parties with an opportunity to be heard. In addition, it does not appear that neighbors may appeal under Code Sec. 3-6-301. The posture of the case and burden of proof are also different. In a violation case, Baltimore County has the burden of proof, which may include the negation of the existence of a nonconforming use. A finding that there is no violation may be made simply because the county has not met its burden. Anything more is *dictum* and superfluous. On the other hand, in a proceeding under BCZR 500.7, the burden is on the property owner affirmatively to establish the existence of the nonconforming use.

In order for an administrative decision to have preclusive effect, the parties against whom preclusion is urged must have had an opportunity to be heard. Batson v. Shiflett 325 Md. 684, 701-17 (1992). That is missing for neighboring citizens in an enforcement case. To illustrate, a verdict of not guilty in a criminal case does not preclude representatives of a victim from pursuit of a civil action. The famous O.J. Simpson case evolved in just this way.

For these reasons, People's Counsel submits that the Zoning Commissioner, and on appeal the County Board of Appeals have authority to determine the nonconforming use status of the Mellor Avenue property. The neighboring citizens have a right to appear as interested parties, to be represented, and to present facts and argument.

II. Baltimore City Property Is Not Exempt from Baltimore County Zoning Law

We know of no authority for the proposition that Baltimore City is exempt from Baltimore County zoning law. Mayor & City Council v. State 281 Md. 217 (1977) and Board of Child Care v. Harker 316 Md. 683 (1989), the cases cited by the Zoning Commissioner, reserve

immunity to state property based on traditional sovereign status. Because a county is a creature of the State, it is presumed that the State is not subject to county laws unless so declared by State legislation. Indeed, the Express Powers Act, Md. Ann. Code Art. 25A, Sec. 5(X) (2)(v)4 states:

> (v) "The (Planning and Zoning) powers granted to the county pursuant to this paragraph shall not be construed:
>
> * * *
>
> 4. To preempt or supersede the regulatory authority of any State department or agency under any public general law."

Baltimore City is a not sovereign over Baltimore County. It is has equal political status.

A more pertinent case is City of Annapolis v. Anne Arundel County 271 Md. 265 (1974), in which the Court held that the county was subject to the Annapolis historic district zoning ordinance. The case turned on the interpretation of the "Historic Area Zoning" ordinance passed by the General Assembly, which enabled counties and municipal corporations to establish historic districts and structural controls. Judge Barnes underlined, at 271 Md. 289:

> "This Court has held, however, that a County can be subject to the reasonable police regulations of an incorporated municipality."

Clearly, if a County may be subject to the zoning law of a city within its boundaries, it may also be subject to the zoning laws of another political subdivision. In this context, we know of no explicit or implicit exemption to grant Baltimore City immunity from the zoning laws of Baltimore County.

The Court of Appeals revisited the immunity issue in Board of Child Care v. Harker 316 Md. 683 (1989). It addressed the status of a private, nonprofit children's home licensed and regulated under Maryland law which asserted it was implementing State policy or functions. The Court held unanimously that the privately owned and operated home was still subject to local zoning law.

In the course of the opinion, Chief Judge Murphy referred to many authorities, including a law review note entitled: Comment, Governmental Immunity from Local Zoning Ordinances 84 Harv. L. Rev. 869 (1971). 316 Md. 694. He continued:

> These authorities make clear that the right to exemption does not turn on the use being made of the property by the party claiming exemption but upon its ownership by the state or its instrumentalities. Were it otherwise, all entities licensed by the state, and providing governmental services, would be entitled to exemption from local land use regulations-a sweeping application of the state exemption doctrine which would undoubtedly undermine the important objectives of municipal zoning."

The Comment also reflects the prevailing national view that cities, towns, and other local government entities are not generally entitled to immunity from local zoning in the absence of a specific statutory exemption. This is especially true where, as here, the local government eventually leased the property to a private business.

III. The Burden of Proof Is on the Property Owner to Demonstrate the Existence of a Nonconforming Use, Subject to the Termination Provisions for Change, Abandonment, and Discontinuance

The above discussion should help to clarify that the present case must be treated like any other special hearing under BCZR 500.7 to determine the existence, scope, and legitimacy of a nonconforming use of property.

BCZR 104.1 allows nonconforming uses to exist unless changed, abandoned or discontinued. BCZR 104.2 addresses fire or other casualty situations. In general, the policy of the law is to eliminate nonconforming uses over time. Prince George's County v. E.L. Gardner 293 Md. 259, 267-68 (1991) contains an excellent discussion of nonconforming use law. Judge Davidson wrote:

> "This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses. In *Grant v. Mayor and City Council of Baltimore,* 212 Md. 301, 307, 129 A.2d 363, 365 (1957), this Court said:

"Nonconforming uses have been a problem since the inception of zoning. Originally they were not regarded as serious handicaps to its effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property owners at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun. Nevertheless, the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned, and the ordinances forbid or limit expansion of nonconforming uses and forfeit the right to them upon abandonment of the use or the destruction of the improvements housing the use."

Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *The Arundel Corp. v. Board of Zoning Appeals of Howard County,* 255 Md. 78, 83-4, 257 A.2d 142, 146 (1969); *Stieff v. Collins,* 237 Md. 601, 604, 207 A.2d 489, 491 (1965); *Colati v. Jirout,* 186 Md. 652, 655, 657, 47 A.2d 613, 614-15 (1946); *Beyer v. Mayor of Baltimore,* 182 Md. 444, 446, 34 A.2d 765, 766 (1943); *See Kastendike v. Baltimore Ass'n for Retarded Children, Inc.,* 267 Md. 389, 397, 297 A.2d 745, 749-50 (1972).

Whether a nonconforming use can be changed, extended, enlarged, altered, repaired, restored, or recommenced after abandonment ordinarily is governed by the provisions of the applicable local ordinances and regulations. *Feldstein v. La Vale Zoning Board,* 246 Md. 204, 211, 227 A.2d 731, 734 (1967); *Phillips v. Zoning Comm'r of Howard County,* 225 Md. 102, 109, 169 A.2d 410, 413 (1961); *Board of Zoning Appeals of Baltimore County v. Gue,* 217 Md. 16, 21-22, 141 A.2d 510, 513 (1958). These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses. *Mayor of Baltimore v. Byrd,* 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati,* 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore,* 180 Md. 88, 96, 23 A.2d 15, 18 (1941); *see City of Hagerstown v. Wood,* 257 Md. 558, 563, 263 A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County,* 220 Md. 48, 59, 151 A.2d 144, 150 (1959)."

Baltimore County zoning law follows the prevailing pattern of nonconforming use law. In this respect, the law here is reminiscent of the law described in Canada Tavern, Inc. v. Town of Glen Echo 260 Md. 206 (1970), where Judge McWilliams wrote:

> "We think the Council, having in mind a larger purpose, intended to align itself with those local governments which have found it desirable to delete the factor of intent in respect of the abandonment, discontinuation, or cessation of nonconforming uses rather than continuing to run the gamut of its judicial determination in a succession of infinitely variable situations."

Canada's Tavern held that expiration of the statutory period of discontinuity terminates the use. There, the lessee restaurateur closed when the liquor license was not renewed. It took time for the owner to get a new lessee to reopen. By then, the statutory period had run. The owner nevertheless applied for and got a certificate of occupancy from the Department of Inspections and Licenses, also approved by the County Attorney. Upon objection by the town, the Board of Appeals affirmed the departmental approval of the certificate, opining that the owner had diligently attempted to find a tenant to continue restaurant operation. The Circuit Court reversed, finding that the intent was irrelevant. The Court of Appeals affirmed the reversal, resulting in the denial of the certificate. Judge McWilliams emphasized the language of the statute is clear and objective.

The County Board of Appeals should and must apply a similar objective standard to the present case.

Conclusion

This case boils down to a classic nonconforming use case. The findings of the Hearing Officer in the violation cases do not have preclusive effect. Neither does the ownership of the property by Baltimore City affect the analysis. The burden is on the property owner to establish with specificity the zoning history and existence of the nonconforming use, and its continuity without material change.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio

CAROLE S. DEMILIO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2004, a copy of the foregoing Memorandum of People's Counsel for Baltimore County hand delivered to Michael Tancyzn, Esquire, 606 Baltimore Avenue, St. 106, Towson, MD 21204 and Benjamin Bronstein, Esquire, 29 Susquehanna Avenue, Suite 205, Towson, MD 21204.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

9/30/03

IN RE: PETITION FOR SPECIAL HEARING NE/S Mellor Avenue, 1,383' S of the c/l Frederick Road **(111 Mellor Avenue)** 1st Election District 1st Council District D. A. Drenner Concrete, Inc., Owners; Linda J. Amos and Susanne Gigliotti, Petitioners	*	BEFORE THE ZONING COMMISSIONER OF BALTIMORE COUNTY Case No. 03-456-SPH

* * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing filed by Linda J. Amos and Susanne Gigliotti, through their attorney Michael P. Tanczyn, Esquire, relative to the subject property, which is owned by D. A. Drenner Concrete, Inc. The Petitioners request a special hearing seeking a determination as to the following: 1) Whether the subject property enjoys a valid, nonconforming use status as a contractor's equipment storage yard; 2) whether Baltimore City's use of the property constitutes an activity which makes the property exempt from the Baltimore County Zoning Regulations (B.C.Z.R.) while so utilized; 3) whether Baltimore City's subsequent lease of the property is a proprietary function for remuneration, making the property subject to the B.C.Z.R. beginning with the lease term; and, 4) whether the Zoning Commissioner/Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a nonconforming use. The subject property and requested relief are more particularly described herein and on the site plan submitted into evidence as Petitioner's Exhibit 6.

Appearing at the requisite public hearing on behalf of the property owners were Dennis A. Drenner and Darrell Drenner, representatives of D. A. Drenner Concrete, Inc., and their attorney, Benjamin Bronstein, Esquire. Susanne Gigliotti and Linda Amos appeared in support of the Petition, along with their attorney, Michael P. Tanczyn, Esquire. Also appearing in support of

the Petition were Shirley Marr, Stephen Amos, Lewis L. and Cindy S. Kibiet, James B. Bossert, and James Jett, all residents of Mellor Avenue.

The Petition for Special Hearing was filed, pursuant to Section 500.7 of the B.C.Z.R. That Section authorizes the Zoning Commissioner to conduct such hearings and pass such Orders as may be necessary for the proper enforcement of the zoning regulations. Section 500.7 also allows any interested person to Petition the Zoning Commissioner for a public hearing to determine any rights whatsoever of such person and any property in Baltimore County. Although most Petitions considered by the Zoning Commissioner are filed by the property owner, Section 500.7 allows adjacent property owners/interested persons to seek a public hearing to determine the propriety of a given use and/or the application of a zoning regulation to a specific property. Thus, the subject Petition is properly filed, pursuant to that Section.

Testimony was received from both sides regarding the history and ongoing use of the subject property. Additionally, numerous documents and exhibits were offered at the hearing, all of which established the factual background to this case, which was largely undisputed. In this regard, the subject property is a rectangular shaped parcel located on the west side of Mellor Avenue, just south of its intersection with Frederick Road in Catonsville. The property contains a gross area of 0.1921 acres, more or less, approximately 2/3 of which is zoned B.M., with the remaining 1/3 zoned D.R.2. Improvements on the property include a one-story tin shed, 18' x 40' in dimension, which is located in the southern, D.R.2 zoned portion of the site, and a container is located in the northern portion of the site, which is zoned B.M. Additionally, there is a concrete retaining wall and long concrete pad along the rear of the property, which cross the zone line, and there are several concrete parking bays along the northern property line. The remaining area of the property is unimproved. The property is enclosed with a combination chain link fence and wood privacy fence.

The City of Baltimore originally owned the subject property from approximately 1925 (see Property Owner Exhibit 4) until March 2000. For many years, the property was used as a maintenance yard to house the Baltimore City Water Department utility trucks. The site also

contained several outdoor buildings and at least one concrete bin. Apparently, the City used the property with varying degrees of intensity until the late 1980s. In approximately 1987/1988, the City generally stopped using the property on any active basis and removed existing materials from the site. On or about October 24, 1990, the City leased the property to Nicodemus Construction Company and the property was thereafter used by that entity for several years as a carpentry shop and to store materials. The Nicodemus Construction Company eventually vacated the site and sat vacant for about one year and on December 3, 1993, the current property owners, D. A. Drenner Concrete, Inc., executed a lease with Baltimore City to use the property as an office and for storage of materials. This lease continued until March 2000, at which time the City sold the property to D. A. Drenner Concrete, Inc. for $12,500.

There was voluminous testimony and evidence offered by the Petitioners regarding the use of the property. It is clear from this record that the activity on the property was relatively modest in terms of scope and impact to the neighborhood when owned by the City. Moreover, it appears that there was a period of 1 or 2 years when the City discontinued the use of the site until the property was again actively used under the lease with Nicodemus Construction Company. In addition, it appears that the activity during the term of the Nicodemus lease was minimal. Although some materials were stored on the site, most of the activity on the property by Nidocemus was within the building.

Since 1993, the nature of the use on the property by the D. A. Drenner Concrete, Inc. has varied. Initially, Drenner mainly used the property for storage; however, in the mid to late 1990s, the activity significantly increased. Testimony and evidence offered by the Petitioners demonstrated that there was significant activity by Drenner for several years. Ultimately, approximately one year ago, Drenner vacated the property. Apparently, they have obtained another site from which the business is operated.

Coincidental with the increased activity on the site by the Drenner Company in the late 1990s, the Petitioners/neighbors took interest in the site. Testimony and evidence indicated that the activity on the property caused noise, dust and traffic in the area to the extent that the neighbors

filed a complaint with Baltimore County. As a result of that complaint, there have been at least four code violation citations issued for the property and hearings conducted in those matters under Cases Nos. 98-2180, 99-6305, 00-0836 and 00-1503. The nature of these alleged violations was that the property was being used as a contractor's equipment storage yard, which is not a permitted use in the B.M./D.R.2 zone.

Copies of two of the decisions rendered in those cases by the Hearing Officer for the Department of Permits and Development Management were offered at the hearing. In Case No. 98-2180, Code Violation Hearing Officer Stanley J. Shapiro dismissed the citation. In his written decision, he stated, "I am persuaded that the subject property has been used as a contractor's or construction equipment storage yard since at least 1938 and quite possibly before 1938." He also noted that Section 104 of the B.C.Z.R. permits the continuation of a nonconforming use. A nonconforming use is defined in Section 101 of the B.C.Z.R. as "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such use." In essence, Hearing Officer Shapiro opined that the use of the property was nonconforming and that there was no violation.

A similar result was reached in Case No. 00-1503. In that matter, similar citations were issued regarding the use of the property. Following a public hearing, Hearing Officer Stanley Shapiro noted again that the property had been used by Baltimore City for the storage of heavy equipment and material used to maintain water and sewer service in Baltimore County. Hearing Officer Shapiro also noted the doctrine of res judicata or claim preclusion. These doctrines prohibit additional litigation when the identical issue had previously been litigated between the same parties. He opined that the citation issued in Case No. 00-1503 must be dismissed because "Baltimore County is precluded from prosecuting this matter by the doctrine of res judicata."

As noted above, the Petition for Special Hearing seeks a determination of four issues. Additionally, following the hearing, Counsel for both parties submitted written memoranda on the issues presented. Within the Petitioner's Memorandum, the four issues were restyled and presented as three matters for resolution. Within its Memorandum, Counsel for the Property

Owners presented a four-pronged argument in opposition to the Petitioner's contentions. These well-written memoranda are self-explanatory and have been reviewed and considered by the undersigned Zoning Commissioner and the following analysis results.

ISSUE No. 1 – The Baltimore County Code Enforcement Official lacks the authority to determine the existence of a nonconforming use.

Baltimore County is a Charter County, pursuant to the provisions of Article 25A of the Annotated Code of Maryland. The Charter was adopted by the voters of Baltimore County on November 6, 1956. The Charter establishes the structure of County government and Section 522 thereof establishes the Office of the Zoning Commissioner.

The authority of the Zoning Commissioner is set forth in the Baltimore County Code. Section 26-3 thereof sets out the method of appointment of the Zoning Commissioner. Section 26-127 provides for the authority of the Zoning Commissioner. It is also to be noted that Section 26-121 of the Code establishes the process for zoning violations. That Section also provides that the Director of the Department of Permits and Development Management shall interpret and enforce the County's zoning regulations. Indeed, Hearing Officer Shapiro's office and authority is founded upon that Section. The B.C.Z.R. also established the authority of the Office of the Zoning Commissioner. Section 500.7 thereof specifically authorizes the Zoning Commissioner, "To determine the existence of any purported nonconforming use on any premises."

These authorities are all persuasive to a finding that the Zoning Commissioner is the sole public official who may determine the existence of a nonconforming use. Arguably, for the purposes of civil code enforcement, the Code Violation Hearing Officer dismissed a violation because he "believed" that a nonconforming use existed. However, that ultimate finding is exclusively reserved to the Office of the Zoning Commissioner.

Having found that the Zoning Commissioner alone has the authority to designate and determine a nonconforming use, it easily follows that the prior decisions made in Cases Nos. 98-2180, 99-6305, 00-0836 and 00-1503 do not therefore trigger the application of the doctrine of res judicata or issue preclusion. Hearing Officer Shapiro had no authority to issue such a ruling.

Moreover, it is well settled that the doctrine of res judicata/issue preclusion is sparingly applied to decisions of administrative bodies (See e.g., Board of County Commissioners of Cecil Co. v. Racine, 24 Md. App. 435 (1975). For reasons that follow, it is clear that Hearing Officer Shapiro incorrectly applied the law in reaching his conclusion.

ISSUE No. 2 – Is/Was the use of the property as a contractor's equipment/construction equipment storage yard nonconforming?

As noted above, nonconforming uses are defined in Section 101 of the B.C.Z.R. and regulated in Section 104 thereof. Nonconforming uses are not favored at law (see McKemy v. Baltimore County, 39 Md. App. 257 (1978). Nonconforming uses are frequently utilized to grandfather an otherwise illegal use. Nonetheless, in that nonconforming uses are considered inconsistent with the scheme and intent of the zoning ordinance, they may be lost due to an abandonment or discontinuance.

More importantly, the testimony and evidence set forth above noted that the subject property was owned and used by Baltimore City for many years, from approximately 1925 until 1990. During that time, the B.C.Z.R. were inapplicable to this property. It is well settled that a municipality is not subject to the zoning ordinance. (See Mayor and City Council of Baltimore v. State, 281 Md. 217 (1977) and Board of Child Care of Baltimore Annual Conference of the Methodist Church v. Harker, 316 Md. 683 (1989). Following the holding of these cases, it is clear that the Baltimore County Zoning Regulations were not applicable to this site during the period of time that the property was used and owned by Baltimore City. The use ongoing at that time was not nonconforming in that the B.C.Z.R., including Sections 101 and 104, were not applicable. Only when the City ceased use of the site in 1990 did the B.C.Z.R. attach and become applicable to this property. Moreover, there was a period of 1 or 2 years when the City discontinued the use of the site until the property was again actively used under the lease with Nicodemus Construction Company. Thus, it is clear that the use of the property as a contractor's equipment storage yard is therefore not nonconforming.

CONCLUSION: Based upon the foregoing, it is clear that the Petition for Special Hearing must be granted. The subject property is not insulated as a nonconforming use in that a) Mr. Shapiro had no authority to grant such approval; and b) the testimony and evidence presented is not persuasive that the use of the property is nonconforming, as defined in Section 101 of the B.C.Z.R. Thus, the property is subject to compliance with all relevant regulations of the B.M. and D.R. 2 zone.

Pursuant to the advertisement, posting of the subject property and public hearing on this Petition held, and for the reasons set forth herein the relief requested is hereby granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 30th day of September, 2003 that, **1)** the subject property does not enjoy a valid, nonconforming use status as a contractor's equipment storage yard; **2)** that Baltimore City's use of the property did constitute an activity which made the property exempt from the Baltimore County Zoning Regulations (B.C.Z.R.) while so utilized; **3)** that Baltimore City's subsequent lease of the property is a proprietary function for remuneration, which made the property subject to the B.C.Z.R. beginning with the lease term; and, **4)** that the Zoning Commissioner/Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a nonconforming use, and as such, the Petition for Special Hearing be and is hereby GRANTED.

IT IS FURTHER ORDERED that any appeal of this decision must be entered within thirty (30) days of the date hereof.

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

9/12/03

111 Mellor Avenue	*	**BEFORE THE**
N/east side Mellor Avenue,		
1,383 feet south of Frederick Road	*	**ZONING COMMISSIONER**
1st Election District - 1st		
Councilmanic District	*	**OF BALTIMORE COUNTY**
Legal Owner:	*	
D.A. Drenner Concrete, Inc.		
	*	
Petitioners:		
Linda J. Amos and	*	
Susanne Gigliotti		**CASE NO.: 03-456-SPH**
	*	

* * * * * * * * * * * * *

MEMORANDUM OF PETITIONERS LINDA J. AMOS AND SUSANNE GIGLIOTTI

NOW COMES Petitioners, Linda J. Amos and Susanne Gigliotti, by their counsel, Michael P. Tanczyn and submit the within Memorandum to assist the Zoning Commissioner in answering the questions raised in the Petition For Special Hearing.

FACTS

The testimony and documentary evidence introduced at the hearing held August 13, 2003 before the Zoning Commissioner, the Honorable Lawrence Schmidt showed that this .1921 acre lot comprising 8,368 feet, more or less, located on the east side of 111 Mellor Avenue, to be split zoned BM and DR2. By history, the property had been owned beginning February 9, 1925 by the Mayor and City Council (Drenner, Exhibit 4). The property had been used by the City of Baltimore as a maintenance yard to house a Baltimore City water department utility repair truck with several open outdoor bins and one building, according to the testimony of Shirley Marr of 100 Mellor Avenue, who had lived in the neighborhood since 1950, as well as the testimony of Jerry Jett, who had lived at 106 Mellor Avenue since 1967 and who had worked for Baltimore County and hauled materials to the site. An additional long-time resident, James Bossert of 88 Mellor Avenue, who had lived there since 1967 also testified similarly as to the use of the site made by Baltimore City. Those parties testified that in approximately 1987 or 1988, the City stopped using the property and the materials had been removed. The City then leased the property two times, as indicated by the letter from the City Solicitor's Office and Councilman Moxley, dated June 18, 2002 (Petitioners' Exhibit 10). That letter had forwarded two leases to Councilman Moxley. The first indicated that the property was leased to Nicodemus Construction Company, by lease dated October 24, 1990, with a start date of November 1, 1990 for the stated use of a carpentry shop and storage of materials. The testimony of the residents and even Darryl Drenner, was that that use had continued for at least a year, if not longer, at the site. That lease was introduced as Petitioners' Exhibit 2. Petitioners'

Exhibit 3 was the lease between Mayor and City Council, dated December 3, 1993, with Drenner Concrete Company, with the stated use for and office and storage of materials. That lease continued until there was a purchase of the property by Drenner Concrete, Inc. by deed, on March 10, 2000 from the Mayor and City Council, whereby the property was purchased by D.A. Drenner Concrete, Inc. for $12,500.00 (Petitioners' Exhibit 4).

Earlier in 1954, a contract purchaser, Franklin Realty and Finance Company, by its agent, David Chertkoff, had sought zoning reclassification for the site from Zone A, residential to Zone F, light industrial. The Zoning Commissioner, by decision, denied that request in 1954, however, granting Zone E, commercial zoning to the site. As was testified to by the Petitioners' witnesses, who represented residents of the immediate neighborhood, the property had been the subject of numerous code enforcement actions, including Case 98-2180, 99-6305, 00-0836, and 00-1503, all of which charged the property lessee, or later as property owner, D.A. Drenner Concrete, Inc., with operating a contractor's equipment storage yard when that was not a permitted use in the zone applicable to the property. It is undisputed on the evidence that at no time previously did the lessee or property owner seek a determination of a non-conforming use by a Special Hearing Petition in Baltimore County.

Additional pictorial evidence showed conditions at the site as they existed in the Fall of 1999, showing the activities taking place on the site, including the old fence, the building, truck traffic, full bins, and the building in use and additional trucks in Exhibits 11A through 11D, and in the fall of 2001, in photographs 12A through 12P, which show Drenner equipment and vehicles on the site and parked and in use with backhoes and equipment in Mellor Avenue. Pictures taken in the winter of 2001 in Exhibit 13A through 13F indicated additional construction, an addition of a trailer for which no building permit had been sought by Drenner Concrete, as well as a yard full of trucks and trailers. In contrast, the pictures taken in 14A and 14B show, in the fall of 2002, an empty lot next to the building and chained off, and in 15, an empty lot and bins next to the building, taken in 2002-2003. Petitioners' Exhibit 16 was a real estate listing of the property for sale as of September 19, 2002 for an asking price of $190,000.00. Additional testimony was given by Lewis Kubiet, who had resided at 116 Mellor Avenue since July 7, 1977, whose testimony was corroborated and proffered as of 1990 by his wife, Cindy, who lived there since that time. He testified that sometime around 1987 or 1988, the City had stopped using the property and had removed material from the site and that all that was left there was an 18-wheeler trailer and a box part of a truck shown in one of the pictures. He testified to the use of the property by Nicodemus Construction as a carpenter shop in 1990, stretching into 1991, which did not use the yard at all. He testified that Nicodemus used the property and the building to store molding, wood, and lumber in the structure and that while Nicodemus was there he would come early in the morning to pick up material and occasionally in the afternoon to drop off material, but would not be there during the day. He testified as to the improvements on the site, including an original chainlink fence with opaque green plastic strips, which was changed several years ago to the wooden fence shown in the more recent pictures, as well as a roll-up door being put on the front of the structure. He testified as to the property being vacant and unused after Nicodemus left in 1991 until the late summer, early fall of 1993 when the Drenner company started to utilize the site. He testified that when Drenner arrived at the site originally, they had utilized only one truck, similar to what Nicodemus had done, but over time, more vehicles came to the property and were stored there and additionally a lowboy trailer was parked there. He testified to the time frame 1996 to 1998, the fact that additional equipment was brought to the site,

including a bobcat, dump trucks and stake body trucks and that the hours of operation increased, beginning in 1998 or 1999, to a start time of 5:30 a.m. and including vehicles returning late in the evening. He testified that sometime in 2002, perhaps in June of 2002, that Drenner began to move from the property. He testified that while Drenner was there, he would weld rebar into forms and welded in the shed and in the street, and cut welding bar in the street, but that would have been done on a sporadic basis. There would have been repairs of equipment in the shed building, including hoist equipment to replace motors to do repairs on the stake body truck or on pieces of equipment stored in the yard. Additional testimony was given by Susanne Gigliotti, who has resided at 108 Mellor Avenue, directly across the street from the site, since July of 1999, as well as from Linda Amos, who had resided at 110 Mellor Avenue since approximately October of 2000. Ms. Amos' testimony was corroborated by proffer from her husband Steve Amos, who also appeared to testify at the hearing as to noise and traffic congestion.

Testimony was also given by Darryl Drenner, who testified that his business was presently located at 10480 Jessup Road in Anne Arundel County. He testified that he had begun Drenner Concrete, Inc. as a business in 1992 and he had first leased this property from the City beginning in August, 1993. Prior to that time he had operated his business behind his parents' home in Catonsville on Montrose Avenue. The property on Jessup Road in Jessup, Maryland, he had purchased in April/May of 2002. He operates his business and stores his equipment, since June of 2002 at 10480 Jessup Road in Jessup, Maryland. He testified that he moved his trucks and equipment out from Mellor Avenue in June of 2002, leaving only a backhoe there for awhile, which he believes he removed in the last 90 days prior to the hearing. He testified that the shed building only had wood stored in the rafters and a couple ladders, which he attributed to the items left there by Nicodemus Contracting when it left the property at the end of its lease. He also testified to a truck body container, which he testified had miscellaneous pipe fittings and concrete wall tiles. In the four bins on the site, he claimed had been used for storing CR6 crusher run and bricks and that there was nothing else there, to the best of his recollection. After he had moved his business in June of 2002, he continued to move rebar, brick, block and mortar pans until the end of August or September of 2002. He then testified to coming back to this property to visit approximately one time a month and to charging up the battery on the backhoe, which had drained down.

Another witness who testified was a real estate agent, Mary Jane McGill, with Long and Foster, who testified as to a listing contract, which was introduced into evidence to sell the property dated September 15, 2002 with Long and Foster.

ISSUE ONE

FOR WHAT PERIOD OF TIME WAS THE PROPERTY 111 MELLOR AVENUE EXEMPT FROM COMPLIANCE WITH BALTIMORE COUNTY ZONING REGULATIONS (BCZR) DURING ITS OWNERSHIP BY BALTIMORE CITY?

THE PROPERTY WAS EXEMPT FROM BCZR WHILE OWNED BY BALTIMORE CITY FROM THE EFFECTIVE DATE OF ZONING IN 1945 UNTIL THE CITY STOPPED USING THE PROPERTY FOR A GOVERNMENTAL FUNCTION WHICH OCCURRED SOMETIME IN 1987 OR 1988; OR AT THE LATEST WHEN THE CITY ENTERED INTO A LEASE WITH NICODEMUS CONSTRUCTION FOR THE

STATED PROPRIETARY USE AS "A CARPENTRY SHOP AND STORAGE OF MATERIALS" ON OCTOBER 24, 1990 WITH A START DATE OF NOVEMBER 1, 1990.

The BCZR define non-conforming use in §101 as "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use (Bill No. 18-1976)" Non-conforming uses are regulated under provisions of BCZR 104.1, which allows non-conforming uses to continue unless any of the following circumstances occur:

1. change from non-conforming use to any other use whatsoever; or
2. abandonment of non-conforming use for one year or more; or
3. discontinuance of non-conforming use for one year or more.

If any of these are met, BCZR 104.1 states the non-conforming use shall terminate.

Maryland Courts have consistently espoused as a general and well established policy against the expansion of non-conforming use and favored strict construction of local ordinances and regulations "to effectuate the purpose of eliminating non conforming use". Trip Associates Inc. v. Mayor & City Council of Baltimore, 151 Md. App. 167, 824 A2d 977 @ 982 (2003). Citing County Council v. Gardner, Inc., 293 Md. 259, 268 (1982) Colati v. Jerout, 186 Md. 652, 655 (1946).

In this case, due to the City's ownership of the property purchased in 1925 until sold by deed March 10, 2000 to D.A. Drenner Concrete, Inc. for $12,500, the threshold issue of an exemption period from the BCZR due Baltimore City is presented. Baltimore City is exempt from the BCZR when enacted into law, so long as it is utilizing the property for a governmental function; but it is subject to such restrictions when it is engaged in a proprietary function. American Law of Zoning §9.03.

Maryland follows that doctrine. In Youngstown Cartage Company v. North Point Peninsula Community Coordinating Council, et al., 24 Md. App. 624 - 631 332 A2d 718, 84 ALR 3d 1181 (1975), the Maryland Court of Special Appeals held that

> "When the State acquires land and then leases or rents that land to a private person or concern for a private use, the land is subject to local zoning ordinances or regulations so long as it is so leased or rented."

The State had acquired land in Baltimore County for its tunnel project. Because it had no immediate use for the property, the State leased the entire 2 acre tract to Youngstown Cartage for a trucking terminal. When Baltimore County received a zoning complaint about that use it initiated proceedings. After hearing, the DZC held that BCZR applied to the leased lands.

On appeal the Board of Appeals rejected the State's view that the Board had no jurisdiction because the State owned the land and decided the case adversely to Appellant. The Circuit Court affirmed the Board holding.

> "There is no question that the property, although State owned, is being used for private enterprise via a landlord-tenant relationship.

> No public use is being made of this property, therefore, it must be zoned in accordance with the zoning regulations before private use may be made of it. Id @ 627.

In affirming the Circuit Court, the Court of Special Appeals rejected the State's ownership argument "because the land in the case now before us is not put to the public use." Id @ 628-630, tracing the definition in caselaw of public use.

Applying that holding to the facts established in this case, the Mayor and City Council's lease with either Nicodemus Construction in 1990 or Drenner in August, 1993 would subject the property to the BCZR which never allowed contractor's equipment storage yards as a permitted use or use by special exception in the zoning for the site at those times.

Further, by the residents' testimony, the City ceased using the property for a utility yard sometime in 1987 or 1988 which is after the time period in which letters were exchanged in 1986 (Drenner, Exhibit 6A, 6B).

ISSUE TWO

DOES 111 MELLOR AVENUE ENJOY A VALID NON-CONFORMING STATUS AS A CONTRACTOR'S EQUIPMENT YARD?

NO, IT DOES NOT AND IT IS UNDISPUTED THAT NO PETITION FOR SPECIAL HEARING WAS EVER FILED BY THE PROPERTY OWNER REQUESTING THE ZONING COMMISSION FIND A VALID NON-CONFORMING USE EXISTS.

BCZR §500.7 empowers the Zoning Commission to conduct a hearing to determine the existence of any purported non-conforming use on any premises. That was never done, and so no valid non-conforming use can exist without that. The property owner's reliance on decisions rendered by Stanley J. Schapiro as Code Enforcement Hearing Officer in cases 98-2180 and 00-1503 regarding 111 Mellor Avenue are unavailing for several reasons.

First, the Code Enforcement Hearing Officer's position, created by 1992 legislation, has no authority to grant a non-conforming use. The Zoning Commissioner, a charter office, alone possesses that power.

Second, Baltimore County has recognized the lack of jurisdiction of the Code Enforcement Hearing Officer by requiring code enforcement complaint respondents who claimed a non-conforming use to Petition the Zoning Commission by Special Hearing to seek a non-conforming use determination. The Code Enforcement action would be routinely stayed to allow that to occur. Perhaps because of the friendship between Benjamin Bronstein (Drenner's attorney) and Stanley Schapiro, that policy was not followed in those cases where Mr. Schapiro dismissed the Complaints. For anyone who believes the law should be applied equally to all subject to it, Mr. Schapiro's decisions are impossible to reconcile.

ISSUE THREE

DOES THE DOCTRINE OF "RES JUDICATA", BASED ON THE CODE ENFORCEMENT HEARING OFFICER STANLEY SCHAPIRO'S DECISION IN THE CODE ENFORCEMENT CASE 98-2180 AND 00-1503 APPLY AS A BASIS TO DISMISS THE RESIDENTS INSTANT SPECIAL HEARING PETITION?

NO, FOR A VARIETY OF REASONS.

First, Mr. Schapiro had no authority to grant a non-conforming use or make that determination. Second, Mr. Schapiro was wrong on the law and the facts applicable to this case. Third, when acquainted with additional facts, Mr. Schapiro fails to make findings of fact to address proprietary leases, abandonment of use, discontinuance of use or even to use complete sentences in his decisions.

The Court of Special Appeals in Board of County Commissioners of Cecil County v. Racine, 24 Md. App. 435, 332 A2d 306 (1975) concluded its opinion rejecting the application of "*res judicata*" in that case as follows:

> "Mistaken interpretations of law, however honestly arrived at are held not to be within the exercise of sound administrative discretion and the legislative prerogative, but to be arbitrary and illegal. Perpetuation of illegality by an administrative body by inflexible application of the principle of *res judicata* is impermissible."

Petitioners adopt the argument from the previous issue, establishing that Stanley Schapiro had no jurisdiction or authority to find the non-conforming use or to make a determination after Special Hearing, for reasons cited and incorporated herein without repetition. Second, Mr. Schapiro erred both as to the law and the facts invoking, at the urging of Drenner's counsel, the doctrine of *res judicata* in this matter. In determining whether *res judicata* should be properly applied in this case, the decision of the Court of Appeals in MPC, Inc. v. Billy Kenny, 279 Md. 29, 367 A.2d 486 (1977) is instructive.

> "The doctrine of *res judicata* is that a judgment between the same parties and [367 A.2d 489} their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit...." (Emphasis added).
>
> "The delineation between res judicata and collateral estoppel was expressed in Sterling v. Local 438, 207 Md. 132, 140-41, 113 A.2d 389, 393, cert. denied, 350 U.S. 875, 76 S.Ct. 119, 100 L.Ed. 773 (1955):"
>
> "... If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the

> earlier case, but as to all matters which could have been litigated (*res judicata*). If, in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case (collateral estoppel)." (citation omitted) Id. @ 32

The Court set forth, as followed in Maryland, as to whether the same evidentiary facts would sustain both actions.

> "The measure which seems to find favor with most courts, and one which we have applied, is whether the same evidentiary facts would sustain both actions. Id. @ 33

The fallacy of invoking *res judicata* in this matter, as was done by the Code Enforcement Hearing Officer, Mr. Schapiro are the same reason why the Zoning Commissioner should reject the request that he apply that doctrine to dismiss the instant Special Hearing position.

> "The basic rule of *res judicata* is that facts or questions which were in issue in a previous action and were therein determined by a court which had jurisdiction of the parties and the subject matter are conclusively settled by a final judgment in the first case and may not again be litigated in a subsequent action between the same parties or their privies even though the subsequent suit takes a different form or is based on a different cause of action."
>
> "There is substantial authority that the doctrine of *res judicata* itself should not be rigidly applied where the prior judgment or decree was the product of error of law. In 46 Am.Jur.2d, Judgments, s 416, it is said:
>
> "There are cases stating that the doctrine precluding the relitigation of issues previously adjudicated in an action on a different cause of action, is confined to issues of fact or, at least, to mixed questions of fact or law, and thereby excluding questions of law from the operation of the doctrine. Under this rule, the doctrine does not extend to erroneous propositions of law applied by the court in reaching its decision."
>
> "An analogous rule is announced in Restatement of the Law of Judgments, s 70, at 318, where it is said:
>
> "Where a questions of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result."

"In comment f. of the above quoted Restatement rule it is said at 324:"

"Where injustice would result. The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons." (Italics supplied.) Id.@ 447-448 ...If, as here, the court rendering the earlier judgment had jurisdiction of the parties and the subject matter, the fact that its final judgment was erroneous or irregular will not prevent that judgment from acting as a bar to a relitigation of the cause of action which was merged in the judgment." (Italics supplied.)

"Should such an inflexible rule of law be made applicable to errors of law by administrative bodies? We think not."

"We recognize, as indeed we must, that an unreversed final decision by a zoning board, passed in the exercise of its discretion upon issues of fact or upon mixed issues of law and fact are fully binding upon the parties to the cause and their privies as to all issues determined thereby. It is only when there has been a substantial change of conditions or it is shown that the decision was the product of fraud, surprise, mistake, or inadvertence, that such an administrative body may reverse its prior decision in litigation between the same parties. Whittle v. Board of Appeals, supra; Woodlawn Assn. v. Board, supra; Gaywood Association v. MTA, 246 Md. 93, 227 A.2d 735. Id. 450, 451.

In examining Mr. Schapiro's decisions in citation 98-2180 and 00-1503, it becomes clear that the parties are not the same, since Baltimore County was the instigating party in that case. Secondly, Mr. Schapiro had no jurisdiction to decide non-conforming uses. He acted against the long standing policy invoked by him in similar cases with other Respondents who claimed a non-conforming use, by not requiring Drenner to petition, by Special Hearing, and staying the Code Enforcement action pending receipt of a final decision from the Zoning Commissioner on the non-conforming use status. His decision in 98-2180 makes findings only that the City owned the property since 1923, in the deed, citing a City exhibit. While the deed in the present case indicates the City bought the property in 1925, in that decision there is no mention of the lease from the City to Nicodemus Construction or the purposes for the lease, nor were either of the leases between the City and Nicodemus or Drenner presented to the Code Enforcement Hearing Officer. Most importantly, in the second last paragraph of that decision, he makes a finding of a non-conforming use, without using those words and on that basis, then says, "based on the uncontradicted, the Respondents should be dismissed." Ignoring the fact that that is gibberish, in fact he had no jurisdiction or authority to make such a determination, and the County policy followed by Mr. Schapiro in other cases was not to make that

determination, but to properly defer to the code position of Zoning Commissioner, which has authority, under BCZR §500.7 to conduct those hearings and make those determinations. His decision in code enforcement case 00-1503, again he finds that the Respondent's use of the property for a contractor's storage yard, "which is not a permitted use of right in an FM zone" makes and misstates the size of the property as .5 acres and that "some of the neighbors said the property was not used as a contractor's storage yard for a period of time." Again there is no mention of the leases between the City and Nicodemus or Drenner, and neither a discussion nor a decision concerning the City's exemption from the BCZR and loss of that exemption when the property was leased for a proprietary or non-governmental purpose through Nicodemus and Drenner.

Upon analysis the effect of Mr. Schapiro's decisions in both cases were to protect the proprietary use of the property, illegally, as a contractor's equipment storage yard, under a finding of non-conforming use, which Mr. Schapiro had no jurisdiction or authority to find as a matter of law. Those decisions cumulatively have the effect of continuing to visit upon the residents of the community, even more intense activity on the part of Drenner Concrete, it's equipment and employees at early hours of the morning through late hours at night, by perpetuating an illegal non-conforming use at the site.

Third, Mr. Schapiro failed to take cognizance of the statue with regard to discontinuance of use or abandonment of use, either of which would have been bases of which to make a proper finding that a non-conforming use could not have applied to this site on the facts applicable to this case. McKemy v. Baltimore County, 39 Md. App. 257, 385 A.2d 96 (1998) In applying the McKemy holding to the facts of this case, the use made by the City for a single vehicle used to take care of water distribution lines with a shed for storage of materials and several open bins should be contrasted with the tremendous expansion of the property use by activity amount and number of pieces of equipment, as utilized by Drenner Concrete. The McKemy court stated that a proper determination of §104.1 of the Baltimore County non-conforming use regulations would have required:

> "In deciding whether the current activity is in the scope of the non-conforming use, the Board should have considered the following factors:
>
> 1. To what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use?"

In the instant case, the use at the time of Nicodemus as a carpentry shop and storage of materials, which was done inside the shed, was a permitted use in a commercial zone and the use by Nicodemus for a permitted use would, under operative law, have terminated the non-conforming use, once the property was then used in a manner and use called for under the statute.

> 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?"

As to that factor, the testimony regarding the City's use of the property was that it was used for storage of materials and parking of a truck. In Drenner's case, many more pieces of equipment

and trucks were there, maintenance was done on the trucks and manufacturing activity, such as cutting up rebar or concrete forms was being done by Drenner during his time at the property. Prior to his utilization of the property, Nicodemus had used the property for storage of carpentry materials and not for parking any vehicles at the site, for the time period of his proprietary lease.

3. "Does the current use have a substantially different effect upon the neighborhood?"

Based on the testimony of the residents, the hours of operation had greatly expanded the area of the site which was utilized and the number and amount of equipment utilized by Drenner, as well as the activities taking place, cutting up rebar, running backhoes up and down Mellor Avenue, with back-up alarms going off in the wee hours of the morning until late at night, would have a substantially different effect, as testified to by the neighbors.

4. "Is the current use a drastic enlargement or extension of the original non-conforming use?"

Again, the City had one truck there next to a shed building and with open bins. The use by Drenner was greatly expanded, and would constitute, under the Court of Special Appeals test, a drastic enlargement or extension of the original non-conforming use beyond that permitted by law. Further, there was ample testimony before the Zoning Commissioner in the instant case, not only of a change to a use as a carpenter shop by Nicodemus under its lease, but periods of abandonment by Drenner, going back to more than a year prior to the time of hearing in this case. The testimony was that Drenner had moved from the site in June of 2002, except for one or two pieces of equipment kept at the property, which had been subsequently removed from the site. Mr. Drenner himself testified as to abandonment of this site when he purchased in April or May of 2002, other land in Jessup, Maryland, where he has operated his business since he moved from this site in June of 2002.

Therefore, there are numerous factors on which the Zoning Commissioner, in the instant case can, and should, conclude the following:

1. That the property does not enjoy and never did enjoy a valid non-conforming use.
2. That when Nicodemus construction leased the property, that was a permitted use under the BM zone and that, by in and of itself, would have terminated any claim of non-conforming use.
3. That Drenner's lease stated the property was to be used for office use and storage of materials. It mentions nothing of perpetuation of a contractor's equipment storage yard as a permitted use under the lease. Other provisions of the lease, which may be seen as boilerplate call for operation of the property by use in accordance with the law. The law prohibited the use at all times, which Mr. Drenner used the property for in a BM or a DR2 zone.
4. The doctrine of *res judicata* has no application in this case. Because Mr. Schapiro had no authority to make a non-conforming use determination, he fumbled the law and the facts, as presented to him. Under those circumstances, the doctrine of *res judicata* has no application in this matter.

For the foregoing reasons, Petitioners request that the Zoning Commissioner answer the questions asked in the Special Hearing as follows:

1. For what period of time was the property, 111 Mellor Avenue exempt from compliance with Baltimore County Zoning Regulations (BCZR) during its ownership by Baltimore City?

   That the City enjoyed an exemption until Nicodemus Construction rented the property in 1990. Thereafter the property became used for a purpose under BM zone and any claim of non-conforming use would have terminated for that reason or because of the abandonment or discontinuance of the use by subsequent tenant and owner, Drenner Concrete. Further, Drenner Concrete's lease called for use of the property as an office and storage of materials and for use of the property, in accordance with law, which also would have terminated any claim of non-conforming use.

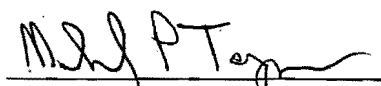
2. Does 111 Mellor Avenue enjoy a valid non-conforming status as a contractor's equipment yard?

   No.

3. Does the doctrine of *res judicata*, based on the Code Enforcement Hearing Officer Stanley Schapiro's decision in the Code Enforcement Case 98-2780 and 00-1503 apply as a basis to dismiss the residents instant Special Hearing Petition?

   No, for a variety of reasons.

Respectfully submitted,



MICHAEL P. TANCZYN, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204
(410) 296-8823
Attorney for the Petitioners,
Linda Amos and Susanne Gigliotti

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 12th day of September, a copy of the foregoing Memorandum of Petitioners Linda J. Amos and Susanne Gigliotti, was mailed to Peter Max Zimmerman, Esquire, Peoples' Counsel for Baltimore County, Room 47, 400 Washington Avenue, Towson, Maryland

21204 and to Benjamin Bronstein, Esquire, Ste. 205, 29 W. Susquehanna Avenue, Towson, Maryland 21204-5218, Attorney for Darryl A. Drenner Concrete, Inc.

MICHAEL P. TANCZYN, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204
(410) 296-8823
Attorney for the Petitioners

LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

September 12, 2003

RECEIVED
SEP 12 2003
ZONING COMMISSIONER

VIA HAND-DELIVERY

Zoning Commissioner
Suite 405
County Courts Building
Towson, Maryland 21204

Re: 111 Mellor Avenue
Case No.: 03-456-SPH

Dear Mr. Commissioner:

Enclosed herewith, as directed, is the Memorandum of the Petitioner, for your consideration in deciding this case.

Very truly yours,

Michael P. Tanczyn, Esquire

MPT/cbl

cc: clients
Benjamin Bronstein, Esquire
Peter Max Zimmerman, Esquire

Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at 111 Mellor Ave., Catsonville, M

which is presently zoned BM ADR 2 MPT

This Petition shall be filed with the Department of Permits and Development Management. The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

1. Whether the above property enjoys a valid, non-conforming use status as a contractor's equipment storage yard?
2. Whether Baltimore City's use of the property constituted an activity which made the property exempt from operation of the Baltimore County zoning regulations, while it was so utilized by Baltimore City?
3. Whether Baltimore City's subsequent lease of the property was a proprietary function for remuneration, making the property subject, beginning with the lease term to the operation and effect of the Baltimore County zoning regulations?
4. Whether the Zonning Commissioner/Deputy Zoning Commissioner have the exclusive authority, pursuant to the Baltimore County Charter to interpret the zoning regulations and to decide whether properties are entitled to an Order finding a non-conforming use?

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above Special Hearing, advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

LEGAL OWNER
~~Contract Purchaser/Lessee:~~

D A BRENNER CONCRETE INC
Name - Type or Print

NOT THE PETITIONER
Signature

111 Mellor Ave
Address — Telephone No.

CATONSVILLE MD 21228
City — State — Zip Code

Neighboring ~~Legal Owner(s):~~ PETITIONERS MPT

Linda J. Amos
110 Melrose Avenue (410) 788-7557
Name - Type or Print

Linda J Amos
Signature

Susanne Gigliotti
108 Mellor Ave. (410) 747-4792
Name - Type or Print

Susanne Gigliotti
Signature

Address — Telephone No.

Catonsville, MD 21228
City — State — Zip Code

Attorney For Petitioner:

Michael P. Tanczyn, Esquire
Name - Type or Print

Michael P Tanczyn
Signature

Michael P. Tanczyn, P.A.
Company

Suite 106, 606 Baltimore Avenue
Address — Telephone No.

Towson, MD 21204 (410) 296-8823
City — State — Zip Code

Representative to be Contacted:

Name

Address — Telephone No.

City — State — Zip Code

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING _____

UNAVAILABLE FOR HEARING 5/13/03 to 5/27/03

Reviewed By JNP Date 4/2/03

Case No. 03-456-SPH

ORDER RECEIVED FOR FILING
Date 4/31/03
By RZP
RZU 9/15/98

Zoning Description for 111 Mellor Avenue

Beginning at a point on the easterly right of way of Mellor Avenue, being a 50.00 foot wide right of way and point also being South 16 degrees 48 minutes 07 seconds East 1383 feet, as now surveyed on the Maryland State Grid System, from the intersection of the easterly right of way of Mellor Avenue and the southerly right of way of Frederick Road; 1) thus leaving Mellor Avenue and running at a right angle to Mellor Avenue North 73 degrees 11 minutes 53 seconds East 62.00 feet to a point; 2) thus running parallel to Mellor Avenue south 16 degrees 43 minutes 07 seconds East 135.00 feet to a point; 3) thus running at right angle to the herein describe second line and also Mellor Avenue. Also running with and binding on the fourth line a recorded in Deed Liber 14361, Folio 556, South 73 degrees 11 minutes 53 seconds West 62.00 feet to a point on Mellor Avenue; 4) running with and binding the aforesaid Mellor avenue right of way, North 16 degrees 48 minutes 07 seconds West 135.00 feet to the point of beginning. Containing 8368 square feet or .1921 acres of land, more of less.

STATE OF MARYLAND
ERVIN SCOTT JOHNSON
No. 1232
ARCHITECT

03-456-SPH

LONG &
FOSTER
(301) 461-1456
ZONING

ZONING NOTICE

CASE # 03-456-SPH

A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD

PLACE: ROOM 106, COUNTY OFFICE BLDG, 111 W. CHESAPEAKE AVENUE TOWSON, MD. 21204

DATE AND TIME: THURSDAY, JUNE 5, 2003 AT 9:00 A.M.

REQUEST: SPECIAL HEARING TO DETERMINE WETHER THE ABOVE PROPERTY ENJOYS A VALID NON CONFORMING USE STATUS AS A CONTRACTOR'S EQUIPMENT STORAGE YARD WHETHER BALTIMORE CITY'S USE OF THE PROPERTY CONSTITUTED AN ACTIVITY WHICH MADE THE PROPERTY EXEMPT FROM OPERATION OF THE BALTIMORE COUNTY ZONING REGULATIONS, WHILE IT WAS SO UTILIZED BY BALTIMORE CITY? WHETHER BALTIMORE CITY'S SUBSEQUENT LEASE OF THE PROPERTY WAS A PROPRIETARY FUNCTION FOR REMUNERATION, MAKING THE PROJECT SUBJECT, BEGINNING WITH THE LEASE TERM, TO THE OPERATION AND EFFECT OF THE BALTIMORE COUNTY ZONING REGULATIONS? WETHER THE ZONING COMMISSIONER/DEPUTY ZONING COMMISSIONER HAVE THAT EXCLUSIVE AUTHORITY, PURSUANT TO THE BALTIMORE COUNTY CHARTER TO INTERPRET THE ZONING REGULATIONS AND TO DECIDE WHETHER PROPERTIES ARE ENTITLED TO AN ORDER FINDING A NON-CONFORMING USE?

POSTPONEMENTS DUE TO WEATHER OR OTHER CONDITIONS ARE SOMETIMES NECESSARY. TO CONFIRM HEARING CALL 887 3391

DO NOT REMOVE THIS SIGN AND POST UNTIL DAY OF HEARING, UNDER PENALTY OF LAW

HANDICAPPED ACCESSIBLE

NOTICE OF ZONING HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson, Maryland on the property identified herein as follows:

Case: #03-456-SPH
111 Mellor Avenue
N/east side Mellor Avenue, 1,383 feet south of Frederick Road
1st Election District – 1st Councilmanic District
Legal Owner(s): D.A. Drenner Concrete, Inc.
Petitioners: Linda J. Amos and Susanne Gigliotti

Special Hearing: to determine whether the above property, enjoys a valid, non-conforming use status as a contractor's equipment storage yard. Whether Baltimore City's use of the property constituted an activity which made the property exempt from operation of the Baltimore County zoning regulations, while it was so utilized by Baltimore City? Whether Baltimore City's subsequent lease of the property was a proprietary function for remuneration, making the project subject, beginning with the lease term to the operation and effect of the Baltimore County zoning regulations? Whether the Zoning Commissioner/Deputy Zoning Commissioner have that exclusive authority, pursuant to the Baltimore County Charter to interpret the zoning regulations and to decide whether properties are entitled to an Order finding a non-conforming use?

Hearing: Thursday, June 5, 2003 at 9:00 a.m. in Room 106, County Office Building, 111 W. Chesapeake Avenue.

LAWRENCE E. SCHMIDT
Zoning Commissioner for Baltimore County

NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Zoning Commissioner's Office at (410) 887-4386.
(2) For information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391.

JT 5/757 May 20 C605111

CERTIFICATE OF PUBLICATION

5/23/, 2003

THIS IS TO CERTIFY, that the annexed advertisement was published in the following weekly newspaper published in Baltimore County, Md., once in each of 1 successive weeks, the first publication appearing on 5/20/, 2003.

- [X] The Jeffersonian
- [ ] Arbutus Times
- [ ] Catonsville Times
- [ ] Towson Times
- [ ] Owings Mills Times
- [ ] NE Booster/Reporter
- [ ] North County News

S. Wilkinson

LEGAL ADVERTISING

CERTIFICATE OF POSTING

RE: Case No.: 03-456-SPH

Petitioner/Developer: LINDA J. AMOS & SUSANNE GIGLIOTTI

Date of Hearing/ Closing: 6-5-03

Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, MD 21204

Attention: BECKY HART

Ladies and Gentlemen: This letter is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at #111 MELLOR AVENUE

The sign(s) were posted on MAY 15, 2003
(Month, Day, Year)

Sincerely,

Garland E. Moore
(Signature of Sign Poster and Date)

GARLAND E. MOORE
(Printed Name)

3225 RYERSON CIRCLE
(Address)

BALTIMORE, MD. 21227
(City, State, Zip Code)

(410) 242-4263
(Telephone Number)

41E3

APPEAL SIGN POSTING REQUEST

CASE NO.: 03-456-SPH

D.A. Drenner Conrete - LEGAL OWNERS

111 Mellor Avenue, CAtonsville

1st ELECTION DISTRICT APPEALED: 10/10/03

ATTACHMENT – (Plan to accompany Petition – Petitioner's Exhibit No. 6

**********COMPLETE AND RETURN BELOW INFORMATION*****

CERTIFICATE OF POSTING

TO: Baltimore County Board of Appeals
400 Washington Avenue, Room 49
Towson, Maryland 21204

Attention: Kathleen Bianco
Administrator

RE: CASE NO.: 03-456-SPH

D.A. Drenner Conrete - LEGAL OWNERS - APPELLANTS

This is to certify that the necessary appeal sign was posted conspicuously on the property located at: 111 Mellor Avenue, Catonsville

The sign was posted on 1/6, 2003 4

By: _____
(Signature of Sign Poster)

GARY FREUND
(Printed Name)

Baltimore County
Department of Permits and
Development Management

Director's Office
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
410-887-3353
Fax: 410-887-5708

April 14, 2003

NOTICE OF ZONING HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 03-456-SPH
111 Mellor Avenue
N/east side Mellor Avenue, 1,383 feet south of Frederick Road
1st Election District – 1st Councilmanic District
Legal Owner: D.A. Drenner Concrete, Inc.
Petitioners: Linda J. Amos and Susanne Gigliotti

Special Hearing to determine whether the above property enjoys a valid, non-conforming use status as a contractor's equipment storage yard. Whether Baltimore City's use of the property constituted an activity which made the property exempt from operation of the Baltimore County zoning regulations, while it was so utilized by Baltimore City? Whether Baltimore City's subsequent lease of the property was a proprietary function for remuneration, making the project subject, beginning with the lease term to the operation and effect of the Baltimore County zoning regulations? Whether the Zoning Commissioner/Deputy Zoning Commissioner have that exclusive authority, pursuant to the Baltimore County Charter to interpret the zoning regulations and to decide whether properties are entitled to an Order finding a non-conforming use?

Hearings: Thursday, June 5, 2003 at 9:00 a.m. Room 106, County Office Building, 111 W. Chesapeake Avenue

Arnold Jablon
Director

AJ:klm

C: Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson 21204
D.A. Drenner Concrete, Inc. 111 Mellor Avenue, Catonsville 21228
Linda Amos, Susanne Gigliotti, 108 Mellor Avenue, Catonsville 21228

NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY WEDNESDAY, MAY 21, 2003.**
(2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
(3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

Printed with Soybean Ink
on Recycled Paper

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

PP

Hearing Room – Room 48
Old Courthouse, 400 Washington Avenue

February 6, 2004

NOTICE OF ASSIGNMENT

CASE #: 03-456-SPH

IN THE MATTER OF: D.A. DRENNER CONCRETE - Legal Owner; LINDA AMOS AND SUSANNE GIGLIOTTI PETITIONERS /PROTESTANTS 111 Mellor Avenue
1st Election District; 1st Councilmanic District

9/30/03 – Z.C.'s Order in which Petition for Variance was GRANTED.

ASSIGNED FOR: **TUESDAY, APRIL 20, 2004 at 10:00 a.m.**

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

Kathleen C. Bianco
Administrator

---

c: Counsel for Appellant /Legal Owner : Benjamin Bronstein, Esquire
Appellant /Legal Owner : D. A. Drenner Concrete /
Dennis Drenner and Darrell Drenner

Counsel for Petitioners /Protestants : Michael P. Tanczyn, Esquire
Petitioners /Protestants : Susanne Gigliotti
Linda Amos

Office of People's Counsel
Lawrence E. Schmidt /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

Printed with Soybean Ink on Recycled Paper

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

April 19, 2004

Via Fax: 410-296-3719

Benjamin Bronstein, Esquire
29 West Susquehanna Avenue
Suite 205
Towson, MD 21204

Via Fax: 410-296-8827

Michael P. Tanczyn, Esquire
606 Baltimore Avenue
Suite 106
Towson, MD 21204

RE: In the Matter of: D.A. Drenner Concrete
Case No.: 03-456-SPH
Postponement

Dear Messrs. Bronstein and Tanczyn:

This letter confirms the telephone conversation with Mr. Tanczyn this date, in which he informed me that his clients had no objection to the postponement requested by Mr. Bronstein.

In addition, this correspondence is to confirm and verify that the above captioned case scheduled for Tuesday, April 20, 2004 has been postponed by mutual agreement of Counsel. The Board and the Court Reporter have been notified.

Very truly yours,

Theresa R. Shelton

Theresa R. Shelton
Legal Secretary

c: Office of People's Counsel
Pat Keller, Planning Director
Lawrence E. Schmidt, Zoning Commissioner
Timothy Kotroco, Director/PDM

Printed with Soybean Ink
on Recycled Paper

BENJAMIN BRONSTEIN
ATTORNEY AT LAW
SUSQUEHANNA BUILDING, SUITE 205
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 296-0200
FAX: (410) 296-3719
Benbronstein@aol.com

April 16, 2004

Via Fax: 410-887-3182
And First Class Mail

RECEIVED
APR 19 2004
BALTIMORE COUNTY
BOARD OF APPEALS

Kathleen C. Bianco, Administrator
Board of Appeals for Baltimore County
400 Washington Avenue
Room 49
Towson, Maryland 21204

RE: Case No.: 03-456-SPH
In the Matter of: D.A. Drenner Concrete, Inc.
111 Mellor Avenue

Dear Ms. Bianco:

I have been notified that D.A. Drenner Concrete, Inc., owner of the subject property in the above-entitled case has sold the property to Mr. Wayne Odochowski. I have called Michael P. Tanczyn, Esquire, who represents the Petitioners in this case with the request that the case be continued in order to give me an opportunity to review the entire matter with Mr. Odochowski. Mr. Tanczyn is attempting to contact his clients. The case is currently set for hearing on Tuesday, April 20, 2004 at 10:00 a.m.

On behalf of Mr. Odochowski, I would appreciate the Board's consideration.

Very truly yours,

Benjamin Bronstein

BB/mlh

cc: Michael P. Tanczyn, Esquire (via fax: 410-296-8827)

LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

August 25, 2004

County Board of Appeals of Baltimore County
Attn: Ms. Kathy Bianco
Old Courthouse, Room 49
400 Washington Avenue
Towson, MD 21204

Re: 111 Mellor Avenue
Case No.: 03-456-SPH

Dear Ms. Bianco

On behalf of the Special Hearing Petitioners, please schedule this matter for hearing. We do not anticipate it will take more than two hours.

Please feel free to contact me should you have any questions.

Very truly yours,

Michael P. Tanczyn, Esquire

MPT/cbl

cc: clients
Benjamin Bronstein, Esquire
Peter Max Zimmerman, Esquire

RECEIVED
AUG 26 2004
BALTIMORE COUNTY
BOARD OF APPEALS

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

Hearing Room – Room 48
Old Courthouse, 400 Washington Avenue

September 3, 2004

NOTICE OF ASSIGNMENT

CASE #: 03-456-SPH

IN THE MATTER OF: 111 MELLOR AVENUE PROPERTY
LINDA AMOS AND SUSANNE GIGLIOTTI -PETITIONERS
/PROTESTANTS; WAYNE ODOCHOWSKI, Legal Owner
1st Election District; 1st Councilmanic District

9/30/03 – Z.C.'s Order in which Petition for Special Hearing filed by Protestants was GRANTED.

ASSIGNED FOR: **WEDNESDAY, DECEMBER 22, 2004 at 10:00 a.m.**

NOTICE: **This appeal is an evidentiary hearing; therefore, parties should consider the advisability of retaining an attorney.**

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests must be in writing and in compliance with Rule 2(b) of the Board's Rules. No postponements will be granted within 15 days of scheduled hearing date unless in full compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

Kathleen C. Bianco
Administrator

---

c: Counsel for Appellant /Legal Owner : Benjamin Bronstein, Esquire
Appellant /Legal Owner : Mr. Wayne Odochowski c/o Mr. Bronstein

Counsel for Petitioners /Protestants : Michael P. Tanczyn, Esquire
Petitioners /Protestants : Susanne Gigliotti
Linda Amos

Office of People's Counsel
Lawrence E. Schmidt /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

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County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

January 6, 2005

NOTICE OF DELIBERATION

IN THE MATTER OF:

111 MELLOR AVENUE
Linda Amos and Susanne Gigliotti– Petitioners
Case No. 03-456-SPH

Having heard this matter on 12/22/04, public deliberation has been scheduled for the following date /time:

DATE AND TIME : **TUESDAY, FEBRUARY 22, 2005 at 9:00 a.m.**

LOCATION : **Hearing Room 48, Basement, Old Courthouse**

NOTE: Closing briefs are due on Friday, January 28, 2005
(Original and three [3] copies)

NOTE: ALL PUBLIC DELIBERATIONS ARE OPEN SESSIONS; HOWEVER, ATTENDANCE IS NOT REQUIRED. A WRITTEN OPINION /ORDER WILL BE ISSUED BY THE BOARD AND A COPY SENT TO ALL PARTIES.

Kathleen C. Bianco
Administrator

c: Counsel for Appellant /Legal Owner : Benjamin Bronstein, Esquire
Appellant /Legal Owner : Mr. Wayne Odochowski c/o Mr. Bronstein

Counsel for Petitioners /Protestants : Michael P. Tanczyn, Esquire
Petitioners /Protestants : Susanne Gigliotti
Linda Amos

Office of People's Counsel
William J. Wiseman III /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

FYI: 3-5-6

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Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
pdmlandacq@co.ba.md.us

August 8, 2003

Michael Tanczyn
606 Baltimore Avenue, Ste. 106
Towson, MD 21204

Dear Mr. Tanczyn:

RE: Case Number: 03-456-SPH, 111 Mellor Avenue

The above referenced petition was accepted for processing by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on April 2, 2003.

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR:klm

Enclosures

c: People's Counsel
Linda Amos, 110 Mellor Ave., Catonsville 21228
Susanne Gigliotti, 108 Mellor Ave., Catonsville 21228
DA Drenner Concrete, 111 Mellor Avenue, Catonsville 21228

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BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits &
Development Management

DATE: April 29, 2003

FROM: RWB Robert W. Bowling, Supervisor
Bureau of Development Plans
Review

SUBJECT: Zoning Advisory Committee Meeting
For April 21, 2003
Item Nos. 456, 458, 460, 461, 462,
463, and 464

The Bureau of Development Plans Review has reviewed the subject-zoning items, and we have no comments.

RWB:CEN:jrb

cc: File

ZAC-4-21-2003-NO COMMENT ITEMS-4292003

Robert L. Ehrlich, Jr., *Governor*
Michael S. Steele, *Lt. Governor*

State Highway Administration
Driven to Excel

Robert L. Flanagan, *Secretary*
Neil J. Pedersen, *Acting Administrator*

MARYLAND DEPARTMENT OF TRANSPORTATION

Date: 4.11.03

Ms. Rebecca Hart
Baltimore County Office of
Permits and Development Management
County Office Building, Room 109
Towson, Maryland 21204

RE: Baltimore County
Item No. 456 JHP

Dear. Ms. Hart:

This office has reviewed the referenced item and we have no objection to approval as it does not access a State roadway and is not affected by any State Highway Administration projects.

Should you have any questions regarding this matter, please contact Larry Gredlein at 410-545-5606 or by E-mail at (lgredlein@sha.state.md.us).

Very truly yours,

for Kenneth A. McDonald Jr., Chief
Engineering Access Permits Division

Baltimore County
Fire Department

700 East Joppa Road
Towson, Maryland 21286-5500
410-887-4500

~~County Office Building, Room 111~~
Mail Stop #1105
111 West Chesapeake Avenue
Towson, Maryland 21204

April 17, 2002

ATTENTION: Rebecca Hart

Distribution Meeting of: April 14, 2003

Item No.: 456 - 464

Dear Ms. Hart:

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

7. The Fire Marshal's Office has no comments at this time.

LIEUTENANT JIM MEZICK
Fire Marshal's Office
PHONE 887-4881
MS-1102F

cc: File

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BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon, Director
Department of Permits and
Development Management

DATE: April 2, 2003

RECEIVED

APR 23 2003

ZONING COMMISSIONER

FROM: Arnold F. 'Pat' Keller, III
Director, Office of Planning

SUBJECT: Zoning Advisory Petition(s): **Case(s) 03-~~457~~** 456

The Office of Planning has reviewed the above referenced case(s) and has no comments to offer. For further questions or additional information concerning the matters stated herein, please contact Mark A. Cunningham in the Office of Planning at 410-887-3480.

Prepared by: Mark A Cunningham

Section Chief: Lynn Lochner

AFK/LL:MAC

RE: PETITION FOR SPECIAL HEARING 111 Mellor Avenue; NE/side Mellor Avenue 1,383' S Frederick Road 1st Election & 1st Councilmanic Districts Legal Owner(s): D.A. Dronner Concrete, Inc Contract Owner(s): Linda J Amos & Susanne Gigliotti Petitioner(s)	* * * * *	BEFORE THE ZONING COMMISSIONER FOR BALTIMORE COUNTY 03-456-SPH

* * * * * * * * * * * * *

ENTRY OF APPEARANCE

Please enter the appearance of People's Counsel in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and the passage of any preliminary or final Order. All parties should copy People's Counsel on all correspondence sent/ documentation filed in the case.

Peter Max Zimmerman
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio
CAROLE S. DEMILIO
Deputy People's Counsel
Old Courthouse, Room 47
400 Washington Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2003, a copy of the foregoing Entry of Appearance was mailed to Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, MD 21204, Attorney for Petitioner(s).

Peter Max Zimmerman
PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

RECEIVED
APR 16 2003
Per.....

BENJAMIN BRONSTEIN
ATTORNEY AT LAW
SUSQUEHANNA BUILDING, SUITE 205
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 296-0200
FAX: (410) 296-3719
Benbronstein@aol.com

October 10, 2003

The Honorable Timothy Kotroco
Zoning Commissioner for Baltimore County
County Courts Building - Suite 405
401 Bosley Avenue
Towson, Maryland 21204

RE: 111 Mellor Avenue
Case No.: 03-456-SPH

Dear Commissioner Kotroco:

On behalf of D.A. Drenner Concrete, Inc. please enter an appeal to the Board of Appeals from the decision of Zoning Commissioner Schmidt rendered on September 30, 2003 in the above-entitled case.

Thank you for your kind consideration.

Very truly yours,

Benjamin Bronstein

BB/mlh

cc: Michael P. Tanczyn, Esquire
Mr. Darrel Drenner, President
D.A. Drenner Concrete, Inc.

RECEIVED
OCT 10 2003
Per.....

Department of Permits and Development Management

Director's Office
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204
Tel: 410-887-3353 • Fax: 410-887-5708

Baltimore County

James T. Smith, Jr., County Executive
Timothy M. Kotroco, Director

November 4, 2003

Michael Tanczyn
606 Baltimore Avenue, Ste. 106
Towson, MD 21204

RECEIVED
NOV - 5 2003
BALTIMORE COUNTY
BOARD OF APPEALS

Dear Mr. Tanczyn:

RE: Case :03-456-SPH, 111 Mellor Avenue

Please be advised that an appeal of the above-referenced case was filed in this office on October 10, 2003, by Benjamin Bronstein. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals (Board).

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to call the Board at 410-887-3180.

Sincerely,

Timothy Kotroco

Timothy Kotroco
Director

TK:klm

c: Lawrence E. Schmidt, Zoning Commissioner
Timothy Kotroco, Director of PDM
People's Counsel
DA Drenner, 111 Mellor Ave., Catonsville 21228
Linda Amos, 110 Mellor Ave., Catonsville 21228
Susanne Gigliotti, 108 Mellor Ave., Catonsville 21228
Benjamin Bronstein, 29 W. Susquehanna Avenue, Ste. 205, Towson 21204

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APPEAL

Petition for Special Hearing
111 Mellor Avenue
N/e side Mellor Ave., 1,383' s of the c/l of Frederick Rd.
1st Election District – 1st Councilmanic District
D.A. Drenner Concrete – Legal Owner
Linda Amos, Susanne Gigliotti - Petitioners

Case No.: 03-456-SPH

✓ Petition for Special Hearing (April 2, 2003)

✓ Zoning Description of Property

✓ Notice of Zoning Hearing (April 14, 2003)

✓ Certification of Publication (May 20, 2003)

✓ Certificate of Posting (May 15, 2003) by Garland Moore

✓ Entry of Appearance by People's Counsel (April 16, 2003)

✓ Petitioner(s) Sign-In Sheet
One Sheet

✓ Protestant(s) Sign-In Sheet
None

✓ Citizen(s) Sign-In Sheet
One Sheet

✓ Zoning Advisory Committee Comments

Petitioners' Exhibit
✓1. Petition for Zoning Re-classification
✓2. Lease Agreement (Oct. 25, 1990)
✓3. Lease Agreement (Aug. 3, 1993)
✓4. Special Warranty Deed
✓5. Deed
✓6. Plat to accompany Petition for Special Hearing
✓7a.-c. Photos
✓8. Photo
✓9.a.-b. Photos
✓10. Letter from Frederick Grant of Dept. of Law
✓11a.-d. Photos (Fall 1999)
✓12a-p. Photos (Fall 2001)
✓13a-f. Photos
✓14a-b. Photos
✓15a-c. Photos
✓16. Metropolitan Regional Information Systems, Inc., Short Listing
✓17. Photo

✓ Protestants' Exhibits:
None
Miscellaneous Exhibits (Marked as Prop. Owner): 1-6B
✓1. Right to sell Listing Contract
✓2. Final Order of Code Enforcement Hearing Officer
✓3. Final Order of Code Official
✓4. Deed
✓5. Fixed Capital Record
✓6a. Letter from Howard Chertkof of Commercial and Industrial Realtor
✓6b. Letter from Francis Kuchta
Misc → 7. Memorandum of Petitioners Linda Amos and Susanne Gigliotti

✓ Zoning Commissioner's Order (GRANTED – September 30, 2003)

✓ Notice of Appeal received on October 10, 2003 from Benjamin Bronstein

Owner of Property:

LEWIS AND CINDY KUBIET
116 MELLOR AVENUE
CATONSVILLE, MD 21228

Smead®
UPC 19510
No. 2K2-150C-1
HASTINGS MN

BENJAMIN BRONSTEIN, ESQUIRE
SUITE 205
SUSQUEHANNA BUILDING
29 W. SUSQUEHANNA AVENUE
TOWSON, MD 21204
ATTORNEY FOR PROPERTY OWNER

c: People's Counsel of Baltimore County, MS #2010
Zoning Commissioner/Deputy Zoning Commissioner
Timothy Kotroco, Director of PDM
Michael Tanczyn, 606 Baltimore Ave., Ste. 106, Towson 21204
DA Drenner, 111 Mellor Ave., Catonsville 21228
Linda Amos, 110 Mellor Ave., Catonsville 21228
Susanne Gigliotti, 108 Mellor Ave., Catonsville 21228

date sent November 4, 2003 klm

2/20/04

Case No. 03-456-SPH

In the Matter of: D. A. Drenner Concrete – Legal Owner; LINDA AMOS AND SUSANNE GIGLIOTTI – PETITIONER /PROTESTANTS

SPH – To determine use status as contractor's equipment storage yard enjoys a valid nonconforming use; whether Baltimore City's use of property constitutes activity exempt from BCZR while so utilized; whether Baltimore City's subsequent lease is proprietary function for remuneration making it subject to BCZR; and whether ZC has exclusive authority to interpret zoning regulations and decide whether property is entitled to finding of nonconforming use.

9/30/03–Z.C.'s Order in which Protestants' special hearing request was GRANTED; does not enjoy nonconforming use; City's use of property constituted activity exempt from BCZR while so utilized; City's subsequent lease is proprietary function for remuneration and property is thereby subject to BCZR; and ZC /DZC have sole authority to interpret zoning regulations and decide whether property is entitled to a finding of nonconforming use.

2/06/04 -Notice of Assignment sent to following; assigned for hearing on Tuesday, April 20, 2004 at 10 a.m.:
Benjamin Bronstein, Esquire
D. A. Drenner Concrete /
Dennis Drenner and Darrell Drenner
Michael P. Tanczyn, Esquire
Susanne Gigliotti
Linda Amos
Office of People's Counsel
Lawrence E. Schmidt /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

4/16/04 – Letter received via FAX from Benjamin Bronstein (follow up to telephone call received by TRS) that he was requesting a postponement of 4/20/04 hearing; Drenner Concrete, Owner, has sold property to Mr. Wayne Odochowski. Spoke with TRS; Mr. Bronstein will contact Mr. Tanczyn regarding any objections to this postponement request. Awaiting return call from Mr. Bronstein and Mr. Tanczyn. If no objections, then case should be pulled from docket upon receipt of written notice from counsel; Board notified.

4/19/04 – T/C from Mr. Tanczyn (received by TRS); his clients have no objection to postponement. Letter from TRS to Counsel this date via FAX; case was postponed; Board and Court Reporter notified.

4/22/04 – Note to file: This matter will be placed at top of "to be assigned" docket. Awaiting further instructions from Counsel for Petitioner as to current status of this Petition. Will contact counsel prior to rescheduling.

8/26/04 – Letter from Michael P. Tanczyn, Esquire, counsel for Petitioners Amos and Gigliotti – requesting that matter be set for hearing; anticipates no more than 2 hours.

8/31/04 – Attempting to find date agreeable to counsel; awaiting telephone call from Mr. Bronstein as to availability of his client prior to scheduling for 12/22/04 date; confirmed okay with Mr. Tanczyn.

9/03/04 – T/C w/Mr. Bronstein; has been unable to reach his client. Will note on notice that Mr. Bronstein's client is now Mr. Wayne Odochowski; copy to be sent c/o Mr. Bronstein (no address on file for Mr. Odochowski).
- Notice of Assignment sent this date for hearing assigned for Wednesday, December 22, 2004 at 10 a.m.

12/22/04 – Board convened for hearing (Wescott, Brassil, Quinn); People's Counsel for Baltimore County's Hearing Memorandum filed by Peter M. Zimmerman at start of hearing; Motion to Add Petitioners, M/M Kubiet, filed by Mr. Tanczyn and accepted; Deed between DA Drenner and Gateway Partners also provided by Mr. Tanczyn at hearing. Hearing concluded this date; closing briefs due from counsel on 1/28/05; deliberation to be assigned and notice sent.

1/06/05 -- Notice of Deliberation sent this date; assigned for Tuesday, February 22, 2005 at 9 a.m. FYI copy to 3-5-6.

1/20/05 – Letter from P. Zimmerman with enclosures: Interoffice memo and attached maps from Carl Richards, PDM, concerning zoning history of case. To be marked as PC Exhibit #1 per agreement that info would be provided after conclusion of hearing. Included in file this date. Copies for 3-5-6 to be sent with closing briefs when filed.

1/27/05 – People's Counsel for Baltimore County's Supplemental Memorandum filed by Office of People's Counsel. (Copies of Mr. Zimmerman's "Hearing Memorandum" provided to Board on 12/22/04.)

1/28/05 – Petitioners' Memorandum filed by Michael P. Tanczyn, Esquire, on behalf of Petitioners /Protestants; also filed a courtesy copy of Motion to Add Petitioner, adding Lewis Kubiet and Cindy Kubiet as Petitioners; added "by verbal order announced by the Chairman of the Board of Appeals for the panel hearing the case on December 22, 2004."

- Appellant's Memorandum filed by Benjamin Bronstein, Esquire, on behalf of Gateway Partners, LLC, Successor Legal Owner and Appellant.
- Copy of each of above Memos to Wescott, Brassil and Quinn this date, including copy of PC Exhibit #1 filed on 1/20/05.
-- Letter from P. Zimmerman supplementing post-hearing memorandum with copy of Board's decision in Case No. 04-250-SPH /Ramsey; Savader, issued 1/27/05.

2/01/05 – Letter from Ben Bronstein written to this office regarding statement made by opposing counsel in Memo filed and requesting that a copy of his letter be placed in the subject file.

2/22/05 – Board convened for public deliberation (Wescott, Brassil, Quinn); concluded this date; unanimous decision that special hearing petition is GRANTED; not a valid nonconforming use; County BCZR applies due to lease; ZC or DZC authorized to interpret BCZR re nonconforming use. Written Opinion/Order to be issued; appellate period to run from date of written Order. (6)

Baltimore County, Maryland
OFFICE OF PEOPLE'S COUNSEL
Room 47, Old CourtHouse
400 Washington Ave.
Towson, MD 21204

410-887-2188
Fax: 410-823-4236

PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

January 28, 2005

RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

Lawrence S. Wescott, Esquire, Panel Chairman
County Board of Appeals
400 Washington Avenue, Room 49
Towson, Maryland 21204

Re: D.A. Drenner Concrete, Inc
111 Mellor Avenue
Case No.: 03-456-SPH

Dear Chairman Wescott,

This letter supplements our post-hearing memorandum by the addition of the enclosed County Board of Appeals opinion dated January 27, 2005, which we just received. The opinion in Case No. 04-250-SPH, In the Matter of Howard Ramsay; Louis and Nita Savader, 2108 Alma Avenue concerns discontinuity of a nonconforming use.

Our office participated in the Alma Avenue case. Our position there is consistent with our office's position in the present case that BCZR 104.1 establishes an objective standard or test for discontinuity of a nonconforming use.

The County Board of Appeals agreed in Ramsay/Savader that the standard is objective. Coincidentally, the same CBA panel which decided that case is presiding in the present case.

Accordingly, we believe that consideration of this opinion will be helpful to the County Board of Appeals in its deliberations here.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

Carole S. Demilio

Carole S. Demilio
Deputy People's Counsel

PMZ/CSD/rmw
Enclosures

cc: Michael Tanczyn, Esquire
Benjamin Bronstein, Esquire

IN THE MATTER OF THE APPLICATION OF HOWARD RAMSAY – LEGAL OWNER; NITA AND LOUIS SAVADER – C.P. FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE W/S OF LIGMAN AVE., NW/COR OF ALMA AND LIGMAN AVENUE (2108 ALMA AVENUE) 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	* BEFORE THE * COUNTY BOARD OF APPEALS * OF * BALTIMORE COUNTY * CASE NO. 04-250-SPH

* * * * * * * * *

OPINION

Background

The property in question is in Edgemere on Jones Creek in the Chesapeake Bay Critical Area. It is comprised of .66 acre zoned D.R. 5.5. The Whistler Corporation bought the property in 1988. At that time there were four single-family dwellings, in excess of the maximum three allowed by multiplying 5.5 x .66. The property also appeared to have setback problems. In the course of rehabilitating the property, Whistler was advised that it had to establish the legitimacy of the nonconforming use of the property. In 1989, the Whistler Corporation, through Howard Ramsay, applied to the Baltimore County Zoning Commissioner for a determination that the subject property was a lawful nonconforming use. The then-Deputy Zoning Commissioner, in Case No. 89-343-SPH, decided that "the subject property consisting of four single-family dwellings has not changed since 1935 and pre-dates the 1945 zoning regulations and that a nonconforming use existed."

In 1989 the Whistler Corporation filed with the State of Maryland for a condominium regime and thereafter rebuilt the four older homes into the newer units which existed on the site at the time of the particular incident in question.

In March 2001, the house at 2108 Alma Avenue was destroyed by a tenant who was residing in the dwelling at the time. He permitted water to overflow and completely damaged the interior of the home to the point that the then-owner, Howard Ramsay, for safety and health reasons, obtained a permit from Baltimore County to raze the property. The permit was issued on March 21, 2001 and the property was razed on or about November 21, 2001.

Due to financial reasons and Mr. Ramsay's inability to secure competent contractors, Mr. Ramsay was unable to start the reconstruction of 2108 Alma Avenue.

Ramsay, and Chris Barkley, his realtor, approached Baltimore County in October 2003. Ramsay and Barkley, as well as the County, recognized that Ramsay needed to take some action to restore 2108 Alma Avenue before the expiration of the 2-year period set forth in BCZR § 104.2. That section states:

> A structure damaged to any extent or destroyed by fire or other casualty may be restored within two (2) years after such destruction or damage but may not be enlarged.

Mr. and Mrs. Louis Savader purchased the properties when it was apparent to Mr. Ramsay, due to his financial situation, that he would not be able to rebuild the house. A Petition for Special Hearing was originally filed by Barkley on behalf of Ramsay requesting "extension of the zoning case #89-343-SPH." The Petition was filed on November 14, 2003, and subsequently amended to include a longer explanation of the need for the extension of the two-year period permitted under § 104.2.

The Zoning Commissioner denied the special hearing and refused to extend the two-year limit permitted for rebuilding or restoring a nonconforming use under § 104.2.

People's Counsel raised several questions in its Brief to the Board. The Board feels that the following questions are pertinent to his matter.

1. Has there been a termination of the nonconforming use?
2. Can the two-year period for restoration lawfully be extended?
3. Has there been compliance with BCZR 500.14 for applications in the Chesapeake Bay Critical Area?

Decision

Nonconforming uses are defined in BCZR § 101 as follows:

> A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

BCZR § 104 governs these uses and states in pertinent part:

> 104.1 A nonconforming use (as defined in § 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 for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

104.2 A structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged. In the case of residential use structures which are nonconforming in density, the number of dwelling units or density units rebuilt may be equal to but may not exceed the number of units which existed before the casualty.

BCZR 500.14 deals with zoning petitions within the Critical Area. It states:

Within the Chesapeake Bay Critical Area.

No decision may be rendered by the Zoning Commissioner on any petition or special exception, variance or special hearing unless the Zoning Commissioner has received from the director of the department of environmental protection and resource management, or his designated representative, written recommendations describing how the proposed requested would:

A. Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off the surrounding lands;

B. Conserve fish, wildlife, and plant habitats; and

C. Be consistent with established land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also adjust the fact that, even if pollution is controlled, the number, movement and activities of persons in that area can create adverse environmental impacts.

Nonconforming uses are generally not looked upon with favor by governmental entities. In general, the policy of the law is to eliminate nonconforming uses over time. *Prince George's County v. E. L. Gardner,* 293 Md. 259, 267-68 (1991).

In the opinion of the Board,, §§ 104.1 and 104.2 of the BCZR are quite clear with respect to the requirements for nonconforming uses. Section 104.1 states that "a nonconforming use (as defined in § 101) may continue except as otherwise specifically provided in these regulations…." [Emphasis supplied.] Section 104.2 allows for a structure that has been damaged or destroyed by other casualty to be restored within 2 years after such destruction or damage. Neither § 104.1 nor § 104.2 provides for any extension or enlargement of the 2-year period.

Petitioner argues that the use of the word "may" in § 104.2 rather than the word "shall" indicates that the Council made the provision "permissive" and not mandatory. The Board takes issue with this interpretation of the language of § 104.2. Section 104.2 states "a structure damaged to any extent or destroyed by fire or other casualty may be restored within two (2) years after such destruction or damage but may not be enlarged. In the case of residential use structures which are nonconforming in density, the number of dwelling units or density units rebuilt may be equal to but may not exceed the number of units which existed before the casualty." [Emphasis added.]

In our opinion it is clear that the word "may" after the word "casualty" indicates that the owner has the right to restore the structure or not restore the structure. The word "may" does not modify the 2-year period for reconstruction. In addition, the use of the word "may" when referring to the number of units again is permissive. It certainly cannot be contended that the use of the word "may" in the last lines of the section would allow more density units to be rebuilt than were originally found in the nonconforming use.

The owners of the unit contend they intended to reconstruct the unit and were prohibited from doing so by the fact that they did not have sufficient funds to undertake a reconstruction project until after the whole condominium was sold. At that point, the owners did not have an opportunity to rebuild the property since there was no time to obtain a building permit, and also there was interference from Hurricane Isabel which occurred at some point during that period of time. While we are sympathetic with the position in which the Petitioners found themselves, unfortunately, the law does not make any provision for this situation. Section 104.1 states in part, "...provided that upon any change from such nonconforming 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."

In our opinion, this language is clear that regardless of the intent of the parties, if the use is abandoned or discontinued for a period of one year or more, the nonconforming use is lost. *See Canada Tavern Inc. v. Town of Glen Echo*, 260 Md. 206, 271 A.2d 664 (1970). Section 104.2 allows the owner of a damaged property a period of 2 years within which to reconstruct the same property to the size and density of the original nonconforming use. It says nothing about extension of time or expansion of the 2-year period. Therefore, we will deny the extension of the nonconforming use as requested in the Petition for Special Hearing.

In addition, we would rely on the fact that the Petitioner has not complied with § 500.14 by requesting from the Director of the Department of Environmental Protection & Resource Management the written recommendations required in that section.

ORDER

THEREFORE, IT IS THIS 27th day of January, 2005 by the County Board of Appeals of Baltimore County

ORDERED that the Petition for Special Hearing to extend the two (2) year period permitted under § 104.2 of the *Baltimore County Zoning* Regulations be and is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chair

Margaret Brassil, Ph.D.

John P. Quinn

BENJAMIN BRONSTEIN
ATTORNEY AT LAW
SUSQUEHANNA BUILDING, SUITE 205
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 296-0200
FAX: (410) 296-3719
Benbronstein@terralaw.net

RECEIVED
FEB 01 2005
BALTIMORE COUNTY
BOARD OF APPEALS

January 31, 2005

Ms. Kathleen C. Bianco, Administrator
Board of Appeals for Baltimore County
400 Washington Avenue
Room 49
Towson, Maryland 21204

RE: Case No.: 03-456-SPH
111 Mellor Avenue

Dear Ms. Bianco:

I have received a copy of the Memorandum filed by Mr. Tanczyn. I am appalled by the statement made by Mr. Tanczyn on page 11 wherein he states:

> "Perhaps because of the friendship between Benjamin Bronstein (Drenner's attorney) and Stanley Schapiro, that policy was not followed in those cases where Mr. Schapiro dismissed the Complaints. For anyone who believes the law should be applied equally to all subject to it, Mr. Schapiro's decisions are impossible to reconcile."

I have been practicing law since 1959 and in Towson since 1970. In all those years, I have never been subjected to such a vicious unfounded attack by opposing counsel. Certainly Mr. Schapiro's reputation for integrity by the Bar and Baltimore County government is beyond reproach.

Over the years I had enumerable lunches with Judges Proctor, Raine, McDaniel, Jennifer and Sfekas. On a number of occasions, I had lunch with Chief Judge Murphy and Chief Judge Wilner. Those judges ruled for and against my respective clients. The facts and law dictated the decisions, not the lunch date.

I have played golf and have had lunch with Larry E. Schmidt, the former Zoning Commissioner, who ruled against my client's position in the instant case, giving rise to this appeal. It is regrettable that Mr. Tanczyn is lacking in civility giving rise to his paranoid comment. I am embarrassed for him.

Please insert a copy of this letter into the Board's file.

Thank you for your kind cooperation.

Very truly yours,

Benjamin Bronstein

BB/mlh

cc: Michael P. Tanczyn, Esquire
Peter Max Zimmerman, People's Counsel

BOARD OF APPEALS OF BALTIMORE COUNTY

MINUTES OF DELIBERATION

IN THE MATTER OF:	111 Mellor Avenue Linda Amos and Susanne Gigliotti - Petitioners Case No.: 03-456-SPH	
DATE:	February 22, 2005	
BOARD/PANEL:	Lawrence C. Wescott John P. Quinn Margaret Brassil	LCW JPQ MB
RECORDED BY:	Theresa R. Shelton / Legal Secretary	
PURPOSE:	To deliberate the Petition for Special Hearing filed by Linda Amos, 110 Melrose Avenue and Susanne Gigliotti, 108 Mellor Avenue, to determine whether the property enjoys a valid non-conforming use, use by Baltimore City made it exempt from Baltimore County zoning; whether the Baltimore City lease was a propriety function and whether the BCZ Commissioner can decide non-conforming use	

PANEL MEMBERS DISCUSSED THE FOLLOWING:

STANDING

- Standing before Court is more stringent than before an Administrative Body/Agency
- An aggrieved party; a party felling aggrieved or an interested party have standing
- Amos and Gigliotti did not bring the appeal; they requested the special hearing

CAN THE CODE ENFORCEMENT OFFICER DETERMINE NON-CONFORMING USE

- If the Code Enforcement Officer made a determination in error the Board would address that issue
- Section 500.7

500.7 The said Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning

Commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.

- Need to determine use via Special Hearing before Zoning Commissioner prior to enforcement. Section 500.6

500.6 In addition to his aforesaid powers, the Zoning Commissioner shall have the power, upon notice to the parties in interest, to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations, or the proper interpretation thereof, and to pass his order thereon, subject to the right of appeal to the County Board of Appeals as hereinafter provided.

- Code Enforcement has the right to act on any violation of the Code – the Zoning Commissioner determines the non-conforming use through a hearing/system
- If non-conforming use – then there is no violation
- Section 104.3

104.3 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 the building so used. This provision does not apply to structures or uses restored pursuant to Section 104.2, except as authorized by the Zoning Commissioner pursuant to Section 307. [Bill No. 124-1991]

COLLATERAL ESTOPPEL AND RES JUDICATA

- Party before the Code Enforcement Officer was County
- Matter not fully litigated before the Code Enfocement Officer
- Nicodemus lease – did not have all the facts
- In any legal situation if Court does not have all the facts, you don't continue with a wrong finding
- Neither issue is involved in this matter

DOCTRINE OF LATCHES

- this matter was not brought before the Board – no testimony was given – the issue is only present in the Memorandum – not litigated – Board will not consider

NON-CONFORMING USE

- Periods of time when not in use
- Use changes
- Change of ownership
- Chain broken for non-conforming use
- City established non-conforming use and has equal relationship with County

- Neither is superior to each other
- The Zoning Commissioner determined that the City and County were equal
- Once the City sold the property it ended the non-conforming use
- Property was leased – non-conforming use stopped
- Two year gap between leases
- Intention is not enough – Tavern case
- Non-conforming use was not established
- Non-conforming use was never determined and if so, was lapsed
- Split Zoning – Property has to abide by BM zoning

ALLEGATIONS IN MEMORANDUM

The allegations set forth in the brief by the Appellant's counsel regarding lunches between certain individuals is DISAVOWED and to be placed in the Order of this Board.

DECISIONS BY BOARD MEMBERS: Unanimous decision by the panel that the Special Hearing is Granted and that there is no valid non-conforming use.

FINAL DECISION: That the Petition for Special Hearing filed by Linda Amos, 110 Melrose Avenue and Susanne Gigliotti, 108 Mellor Avenue, to determine whether the property enjoys a valid non-conforming use, use by Baltimore City made it exempt from Baltimore County zoning; whether the Baltimore City lease was a propriety function and whether the BCZ Commissioner can decide non-conforming use is GRANTED and that there is no valid non-conforming use. In addition, the allegations set forth in the brief by the Appellant's counsel regarding lunches between certain individuals is DISAVOWED.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place that date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by this Board.

Respectfully submitted,

FILE COPY

Theresa R. Shelton
County Board of Appeals

PLEASE PRINT CLEARLY

CASE NAME 111 Mellor Ave - SPH
CASE NUMBER 03-456 SPH
DATE Aug 13, 2003 Wed

PETITIONER'S SIGN-IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E- MAIL
Susanne Gigliotti	108 Mellor Ave	Catonsville MD 21228	sgigliotti@yahoo.com
Linda Amos	110 Mellor Ave	Catonsville MD 21228	spljamos@aol.com
SHIRLEY MARR	100 MELLOR AVE	" " "	
Stephen Amos	110 mellor Ave	" " "	Spljamos@aol.com
Lewis L Kubiet	116 Mellor Ave	Catonsville MD 21228	lewis.kubiet@irs.gov
Cindy S Kubiet	116 Mellor Ave	Catonsville MD 21228	Kubiet@umbc.edu
James B Bosser	88 Mellor ave	" "	
[illegible]	106 Mellor ave	" "	
Michael TANCZYN	Ste 106 606 Baltimore Ave	Towson Md 21204	Michael_TANCZYN@HOTMAIL.COM

PLEASE PRINT CLEARLY

CASE NAME 03-457 SPH
CASE NUMBER
DATE 8/13/03

CITIZEN'S SIGN-IN SHEET

NAME	ADDRESS	CITY, STATE, ZIP	E- MAIL
Benjamin Bronstein	29 W Susquehanna Ave	Towson Md 21204	Benbronstein@aol.com
DENNIS A. DRENNER	13900 Kennedy Dr	Glenelg MD 21737	
MAREL DRENNER	8501 DOLLY HYDE RD	UNIONBRIDGE MD	

This Deed, MADE THIS 9th day of April in the year Two Thousand Four by and between **D.A. Drenner Concrete, Inc.**, a body corporate of the State of Maryland, party of the first part, and **Gateway Partners, LLC**, a Maryland limited liability company party of the second part.

Witnesseth, That in consideration of the sum of **Eighty Five Thousand Dollars and NO Cents ($85,000.00)**, the receipt of which is hereby acknowledged, the said party of the first part does grant and convey to the said party of the second part, its successors and assigns, in fee simple, that parcel of ground situated in Baltimore County, Maryland and described as follows, that is to say:

Beginning For The Same at a point, being a rebar and cap set on the easterly right-of-way of Mellor Avenue, being a 50.00 foot wide right-of-way, said point also being South 16 degrees 48 minutes 07 seconds East 1357.69 feet, as now surveyed on the Maryland state grid system, from the intersection of the easterly right-of-way of Mellor Avenue and the southerly right-of-way of Frederick Road; 1) thence leavinf Mellor Avenue and running at a right angle to Mellor Avenue North 72 degrees 11 minutes 53 seconds east 62.00 feet to a point, being a cross cur (+) set on top of a concrete wall; 2) thence running parallel to Mellor Avenue South 15 degrees 48 minutes 07 seconds East 135.00 feet to a point, being a rebar and cap set; 3) thence running at right angle to the herein described second line and also Mellor Avenue. Also running with and binding on the fourth line as described in a Deed dated May 19, 1954 and recorded among the Land Records of Baltimore County in Liber 2509, folio 474, South 73 degrees 11 minutes 53 seconds West 62.00 feet to a point, being a rebar and cap set along the above mentioned right-of-way of Mellor Avenue; 4) thence running with and binding on the aforesaid Mellor Avenue right-of-way North 16 degrees 48 minutes 07 seconds West 135.00 feet to the point of beginning. **The improvements thereon being known as No. 111 Mellor Avenue**

Tax ID No. 01-01-13-200001

BEING the same parcel of ground which by deed dated March 10, 2000 and recorded among the Land Records of Baltimore County, Maryland in Liber No. 14361, folio 556 was granted and conveyed by Mayor and City Council of Baltimore, a Municiple Corporation of the state of Maryland unto D.A. Drenner Concrete, Inc., the Grantor herein.

This is to certify the within instrument was prepared under the supervision of an Attorney duly admitted to practice before the Court of Appeals of the State of Maryland.

Edward J. Brush

Edward J. Brush, Esquire

TOGETHER with the buildings thereupon, and the rights, alleys, ways, waters, privileges, appurtenances and advantages thereto belonging, or in anywise appertaining.

TO HAVE AND TO HOLD the said described lot of ground and premises to the said party of the second part its successors and assigns, in fee simple.

And the said party of the first part hereby covenants that it has not done or suffered to be done any act, matter or thing whatsoever, to encumber the property hereby conveyed; that it will warrant specially the property hereby granted; and that it will execute such further assurances of the same as may be requisite.

And the said party of the first part hereby certifies that this conveyance is not a part of a transaction effecting a sale, lease, exchange or other transfer of all or substantially all of the property and assets of said corporate grantor herein.

WITNESS the name and corporate seal of said body corporate and the signature of the President thereof and the hand(s) and seal(s) of said Grantee(s).

Attest: **D.A. DRENNER CONCRETE, INC.**

_____ By: _____(SEAL)
Darrell Drenner President

_____ _____(SEAL)

State Of MARYLAND, County Of BALTIMORE, to wit:

I Hereby Certify, That on this 9 th day of April in the year Two Thousand Four, before me, the subscriber, a Notary Public of the State of Maryland, County of Baltimore personally appeared Mike Clevenger who acknowledged himself to be the President of D.A. DRENNER CONCRETE, INC. a body corporate of the State of Maryland, and that he as such President being authorized so to do, executed the aforegoing instrument for the purposes therein contained, by signing in my presence, the name of the corporation by himself as such President.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

_____

My Commission Expires: _____, ____

F. MICHAEL GRACE BALTIMORE COUNTY MARYLAND NOTARY PUBLIC

F. Michael Grace, Notary Public
Baltimore County
State of Maryland
My Commission Expires Dec. 1, 2004

RECORD AND RETURN TO: Gateway Partners, LLC
3333 Velvet Valley Way
West Friendship, MD 21794

File Number: **17367CAT**

Form A2

AFFIDAVIT AS TO TOTAL PAYMENT
RESIDENT/PRINCIPAL RESIDENCE
EXEMPT FROM WITHHOLDING

THE undersigned certify under the penalties of perjury, that the following is true to the best of my/our knowledge, information and belief, in accordance with Section 10-912(b)(2) of the Tax-General Article of the Annotated Code of Maryland, (the "Withholding Law"):

1. That I am/we are the transferor(s), (or agent of the transferor(s) if so indicated), of that real property described in the accompanying deed.

2. The amount of total payment for the purpose of the Withholding Law is $ 97,792.50.

DATED this 9th day of April, 2004.

WITNESS: TRANSFEROR(S)

D.A. Drenner Concrete, Inc.

A-1

Certification of Exemption from Withholding Upon Disposition of Maryland Real Estate
Affidavit of Residence or Principal Residence

Based on the certification below, Transferor claims exemption from the tax withholding requirements of §10-912 of the Tax-General Article, Annotated Code of Maryland. Section 10-912 provides that certain tax payments must be withheld and paid when a deed or other instrument that effects a change in ownership of real property is presented for recordation. The requirements of §10-912 do not apply when a transferor provides a certification of Maryland residence or certification that the transferred property is the transferor's principal residence.

1. Transferor Information
Name of Transferor: D. A. Drenner Concrete, Inc.

2. Reasons for Exemption	
Resident Status	☐ I, Transferor, am a resident of the State of Maryland. ☑ Transferor is a resident entity under § 10-912(A)(4) of the Tax-General Article of the Annotated Code of Maryland, I am an agent of Transferor, and I have authority to sign this document on Transferor's behalf.
Principal Residence	☐ Although I am no longer a resident of the State of Maryland, the Property is m principal residence as defined in IRC §121.

Under penalty of perjury, I certify that I have examined this declaration and that, to the best of my knowledge, it is true, correct, and complete.

3a. Individual Transferors	
Witness	Name
	Signature

3b. Entity Transferors	
Witness/Attest	Name of Entity: D. A. Drenner Concrete, Inc
	By: Darrell Drenner
	President
	Name
	Title

0020092 012

State of Maryland Land Instrument Intake Sheet

[] Baltimore City [X] County: Baltimore County

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office only.

(Type or Print in Black Ink Only - All Copies Must Be Legible)

TMP FD SURE $ 20.00
RECORDING FEE 20.00
TR TAX STATE 425.00
TOTAL 465.00
Rec# BA06 Rcpt # 60899
SM BC Blk # 4156
May 20, 2004 10:09 am

1 Type(s) of Instruments (Check Box if Addendum Intake Form is Attached.)

1 Deed	Mortgage	Other _____	Other _____
Deed of Trust	Lease		

2 Conveyance Type Check Box

X Improved Sale Arm-Length[1]	Unimproved Sale Arms-Length[2]	Multiple Account Arms-Length[3]	Not an Arms-Length Sale[9]

3 Tax Exemptions (if applicable) Cite or Explain Authority

Recordation
State Transfer
County Transfer

4 Consideration and Tax Calculations

Consideration Amount		Finance Office Use Only	
Purchase Price/Consideration	$ 85,000.00	Transfer and Recordation Tax Consideration	
Any New Mortgage	$ .00	Transfer Tax Consideration	$
Balance of Existing Mortgage	$	X( )% =	$
Other:	$	Less Exemption Amount -	$
		Total Transfer Tax =	$
Other:	$	Recordation Tax Consideration	$
		X( ) per $500 =	$
Full Cash Value	$	TOTAL DUE	$

5 Fees 20 20 425

Amount of Fees	Doc. 1	Doc. 2	
Recording Charge	$ 20.00	$	Agent:
Surcharge	$ 20.00	$	Tax Bill:
State Recording Tax	$ 425.00	$	
State Transfer Tax	$ 425.00	$	C.B. Credit:
County Transfer Tax	$ 1275.00	$	
Other	$	$	A.G. Tax/Other:
Other	$	$	

6 Description of Property

SDAT Requires Submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-10(g)(3)(i).

District	Property Tax ID No.(1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG [] (5)
01	01-13-200001	14361/556			

Subdivision Name	Lot (3a)	Block(3b)	Sect/AR(3c)	Plat Ref.	SqFt/Acreage(4)

Location/Address of Property Being Conveyed (2): 111 Mellor Avenue, Catonsville, MD 21228

Other Property Identifiers (if applicable) | Water Meter Account No.

Residential [X] or Non-Residential [ ] | Fee Simple [X] or Ground Rent [ ] Amount: $

Partial Conveyance? [ ] Yes [X] No | Description/Amt. of SqFt/Acreage Transferred:

If Partial Conveyance, List Improvements Conveyed:

7 Transferred From

Doc. 1 - Grantor(s) Name(s)	Doc. 2 - Grantor(s) Name(s)
D.A. Drenner Concrete, Inc.	
Doc. 1 - Owner(s) of Record, if Different form Grantor(s)	**Doc. 2 - Owner(s) of Record, if Different form Grantor(s)**

8 Transferred To

Doc. 1 - Grantee(s) Name(s)	Doc. 2 - Grantee(s) Name(s)
Gateway Partners, LLC	

New Owner's (Grantee) Mailing Address: 3333 Velvet Valley Way, West Friendship, MD 21794

9 Other Names To Be Indexed

Doc. 1 - Additional Name(s) to be Indexed (Optional)	Doc. 2 - Additional Name(s) to be Indexed (Optional)

10 Contact/Mail Information

Instrument Submitted By or Contact Person

Name: Barbara Thomas FILE: 17367CAT

Firm: The Fountainhead Title Group

Address: 300 Frederick Road

Suite 100, Catonsville, MD 21 (410) 744-5252

[ ] Return to Contact Person
[ ] Hold for Pickup
[X] Return Address Provided

11 IMPORTANT: BOTH THE ORIGINAL DEED AND A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER

Assessment Information

[ ] Yes [X] No Will the property being conveyed be the grantee's principal residence?
[ ] Yes [X] No Does transfer include personal property? If yes, identity:
[ ] Yes [X] No Was property surveyed? If yes, attach copy of survey (if recorded, no copy required)

Assessment Use Only - Do Not Write Below This Line

[] Agricultural Verification [] Whole [] Part [] Tran. Process Verification

Transfer Number: Date Received: Deed Reference: Assigned Property No.

Year	19	19	Geo	Map	Sub	Block
Land			Zoning	Grid	Plat	Lot
Building			Use	Parcel	Section	Occ. Cd.
Total			Town Cd.	Ex. St.	Ex. Cd.	

REMARKS:

>RECEIPT[] 252214 5/03/2004 DRLN
Dept. of Assessments & Taxation
RECORDATION TAXES
ACCOUNT NO 01132000001
$1,700.00
CK $.00 CA
Baltimore County, Maryland

BOARD OF APPEALS OF BALTIMORE COUNTY
POST-HEARING BRIEFS
IN THE MATTER OF: DA DRENNER; GATEWAY PARTNERS

DATE: January 28, 2005

TO: L.Wescott
M. Brassil
J. Quinn

FROM: Kathi

SUBJECT: Case No. 03-456-SPH / *In the Matter of: D. A. Drenner Concrete (Gateway Partners LLC, Successor to Drenner); Linda J. Amos, et al –Petitioners /Protestants*

Attached are the following documents filed in the subject matter:

- ✓ People's Counsel for Baltimore County's Supplemental Memorandum filed by Peter M. Zimmerman, People's Counsel (this Memo supplements the "Hearing Memorandum" Peter filed on 12/22/04 at hearing, a copy of which should now be with your hearing notes);
- ✓ Memorandum of Petitioners Linda J. Amos, Susanne Gigliotti, Lewis Kubiet and Cindy Kubiet; and;
- ✓ Appellants' Memorandum filed by Benjamin Bronstein, Esquire, on behalf of Legal Owner.

In addition, on January 20, 2005, People's Counsel provided a copy of an inter-office memo from Carl Richards regarding the zoning history of the case, to be entered as People's Counsel Exhibit 1 "per the agreement that this information would be provided after the hearing concluded…." A copy of that "exhibit" is also attached.

Public deliberation is scheduled in this matter on Tuesday, February 22, 2005 at 9 a.m. Notice of that deliberation was sent out on 1/06/05; hearing held on 12/22/04.

Any questions, please call me.

kathi

Attachments ~~(3)~~ (4)

RE: PETITION FOR SPECIAL HEARING NE/S Mellor Avenue; 1,383' S of c/l Frederick Road (111 Mellor Avenue)	*	BEFORE THE
	*	COUNTY BOARD
1st Election District, 1st Councilmanic District	*	OF APPEALS
Legal Owner(s): D.A. Drenner Concrete, Inc Contract Purchaser(s): Linda J Amos & Susanne Gigliotti	*	FOR
	*	BALTIMORE COUNTY
Petitioners		
	*	Case No. 03-456-SPH

* * * * * * * * * * * *

PEOPLE'S COUNSEL FOR BALTIMORE COUNTY'S HEARING MEMORANDUM

Introduction

Upon review of the record, it is in the public interest to address the procedural and substantive issues raised in this case concerning the viability, as a nonconforming use, of a contractor's (or construction) equipment storage yard on property zoned B.M (Business-Major) and D.R. 2 (Density Residential – maximum 2 units per acre) in Catonsville. People's Counsel is interested to defend the comprehensive maps and law. People's Counsel v. Maryland Marine 316 Md. 491 (1989); People's Counsel v. Crown Dev. Corp. 328 Md. 303 (1992); Sycamore Realty v. People's Counsel 344 Md. 57 (1996); Marzullo v. Kahl 360 Md. 158 (2002).

To begin with, this use is allowed by special exception in the B.R. (Business Roadside) zone, BCZR 236.4; by right in the M.L. (Manufacturing-Local) zone, BCZR 253.1.B.3; and by right subject to setbacks in the M.H. (Manufacturing-Heavy) under the other manufacturing use category, BCZR 256.3. It is not permitted by right or special exception in the B.M. or D.R. 2 zones. BCZR 233, 1B01. Therefore, it is prohibited. BCZR 102.1; Kowalski v. Lamar 25 Md. App. 493, 498-99 (1975).

Baltimore County first enacted a comprehensive set of zoning regulations and maps in 1945. See Kahl v. Consolidated Gas & Electric Co. 191 Md. 249 (1948). The then County

Commissioners passed a new set of laws in 1955, and there have been amendments of varying scope and type thereafter. The source of the three main Business Zones is the 1955 law. The source of the D.R. zones is Bill 100, 1970, which amended a different set of zones based primarily on minimum lot size and type of use.

A "Nonconforming Use" is defined under BCZR 101, in pertinent part, as a "Legal use that does not conform to a use regulation for the zone in which it is located ...." BCZR 104, also derived from the 1955 BCZR, as amended, sets the parameters for nonconforming uses, including the occasions for termination of such uses. BCZR 104.1. The Court of Appeals has emphasized that zoning laws anticipate the eventual disappearance of nonconforming uses because they are by nature incompatible with the zones in which they are situated. The law, however, considers them to be vested until they are changed, abandoned, or discontinued. The law does not favor nonconforming uses, and the law must be interpreted in that light. Prince George's County v. E.L. Gardner,Inc. 293 Md. 259 (1982).

Questions Presented

The Zoning Commissioner's September 30, 2003 opinion and order posits two questions, which we anticipate will reappear at the upcoming *de novo* County Board of Appeals hearing. We rephrase and renumber these questions as follows:

1. Does the Baltimore County Code Enforcement Official have authority to determine the existence of a nonconforming use, and if so, does his decision have preclusive (or *res judicata*) effect in a petition for special hearing?
2. Is the use of Baltimore County property by Baltimore City or its tenant exempt from Baltimore County Zoning Regulations?
3. Whether there was ever any nonconforming use, and, if so, has it terminated by change or discontinuance under BCZR 104?

Relevant Zoning Regulations

BCZR 101: "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use."

BCZR 104.1: "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."

Statement of Facts

We will assume the facts are as stated in the ZC opinion. If the evidence shows material differences, we reserve the right to take them into account.

The City of Baltimore owned the property from 1925 until March, 2000. The original use was for maintenance of City utility trucks. In the late 1980s (1987/1988), the City's use ended. According to the ZC opinion, evidence showed this use to be modest, with little impact on the surrounding residential neighborhood. It also appears that there was no use of the site for one or two years after the City discontinued its operations.

In October, 1990, the City leased the property to Nicodemus Construction Company for a carpentry shop and to store materials. Nicodemus made minimal use of the site, with mostly indoor activity. A few years later, Nicodemus left, although the opinion is silent as to precisely when.

In December, 1993, the City leased the property to D.A. Drenner Concrete, Inc. to use the property as an office and for storage of materials. Initially, the main use was for storage. Between 1995 and 2000, however, the activity increased. This led to objections by neighbors because of noise, dust, and traffic, and to the filing of zoning complaints resulting in four citations between 1998 and 2000. In two of these cases, the Hearing officer declined to find any

violation because he ruled that the property enjoyed a nonconforming use as a contractor's equipment storage yard since 1938.

In March, 2000, the City sold the property to Drenner. But, in 2002, about a year before the September, 2003 opinion, Drenner moved its operation and vacated the site. It is unclear what use has been made of the site between the middle of 2002 and now, at the end of 2004.

In 2003, various neighbors filed a petition for special hearing to determine the status of the property and the legality or viability of any nonconforming use. The Zoning Commissioner ultimately determined that the use had terminated by discontinuance. The property owners appealed.

Argument

I. A Hearing Officer Decision in a Violation Case Does Not Preclusive Effect Here

The responsibility for determination of the legal existence of a nonconforming use rests with the Zoning Commissioner under BCZR 500.7. This establishes the authority and function to hold a special hearing to resolve this and other legal issues.

A property owner may not defend against a violation citation by asserting the existence of a nonconforming use. Rather, BCZR 500.7 provides the special hearing as the explicit and exclusive remedy for a property owner to establish or legitimize such a use. In this context, the Zoning Commissioner, having been designated to exercise this statutory authority, came to the reasonable conclusion that an equivalent determination by the Hearing Officer in a violation case would frustrate the legislative purpose.

Even if the Hearing Officer could properly consider the nonconforming use defense, as the Officer did here, we are convinced that his ruling in favor of the property owner is not preclusive. Code enforcement is governed by Secs. 3-6-201, et seq. of the County Code (2003).

The parties in the violation case are Baltimore County, a body corporate and politic, and the property owner. The county law office and code inspectors prosecute enforcement. Neighboring citizens are not listed as parties. They could possibly be witnesses, but they do not appear as parties with an opportunity to be heard. In addition, it does not appear that neighbors may appeal under Code Sec. 3-6-301. The posture of the case and burden of proof are also different. In a violation case, Baltimore County has the burden of proof, which may include the negation of the existence of a nonconforming use. A finding that there is no violation may be made simply because the county has not met its burden. Anything more is *dictum* and superfluous. On the other hand, in a proceeding under BCZR 500.7, the burden is on the property owner affirmatively to establish the existence of the nonconforming use.

In order for an administrative decision to have preclusive effect, the parties against whom preclusion is urged must have had an opportunity to be heard. Batson v. Shiflett 325 Md. 684, 701-17 (1992). That is missing for neighboring citizens in an enforcement case. To illustrate, a verdict of not guilty in a criminal case does not preclude representatives of a victim from pursuit of a civil action. The famous O.J. Simpson case evolved in just this way.

For these reasons, People's Counsel submits that the Zoning Commissioner, and on appeal the County Board of Appeals have authority to determine the nonconforming use status of the Mellor Avenue property. The neighboring citizens have a right to appear as interested parties, to be represented, and to present facts and argument.

II. Baltimore City Property Is Not Exempt from Baltimore County Zoning Law

We know of no authority for the proposition that Baltimore City is exempt from Baltimore County zoning law. Mayor & City Council v. State 281 Md. 217 (1977) and Board of Child Care v. Harker 316 Md. 683 (1989), the cases cited by the Zoning Commissioner, reserve

In the course of the opinion, Chief Judge Murphy referred to many authorities, including a law review note entitled: Comment, Governmental Immunity from Local Zoning Ordinances 84 Harv. L. Rev. 869 (1971). 316 Md. 694. He continued:

> These authorities make clear that the right to exemption does not turn on the use being made of the property by the party claiming exemption but upon its ownership by the state or its instrumentalities. Were it otherwise, all entities licensed by the state, and providing governmental services, would be entitled to exemption from local land use regulations-a sweeping application of the state exemption doctrine which would undoubtedly undermine the important objectives of municipal zoning."

The Comment also reflects the prevailing national view that cities, towns, and other local government entities are not generally entitled to immunity from local zoning in the absence of a specific statutory exemption. This is especially true where, as here, the local government eventually leased the property to a private business.

III. The Burden of Proof Is on the Property Owner to Demonstrate the Existence of a Nonconforming Use, Subject to the Termination Provisions for Change, Abandonment, and Discontinuance

The above discussion should help to clarify that the present case must be treated like any other special hearing under BCZR 500.7 to determine the existence, scope, and legitimacy of a nonconforming use of property.

BCZR 104.1 allows nonconforming uses to exist unless changed, abandoned or discontinued. BCZR 104.2 addresses fire or other casualty situations. In general, the policy of the law is to eliminate nonconforming uses over time. Prince George's County v. E.L. Gardner 293 Md. 259, 267-68 (1991) contains an excellent discussion of nonconforming use law. Judge Davidson wrote:

> "This Court has repeatedly recognized that one of the fundamental problems of zoning is the inability to eliminate incompatible nonconforming land uses. In *Grant v. Mayor and City Council of Baltimore,* 212 Md. 301, 307, 129 A.2d 363, 365 (1957), this Court said:

> "Nonconforming uses have been a problem since the inception of zoning. Originally they were not regarded as serious handicaps to its effective operation; it was felt they would be few and likely to be eliminated by the passage of time and restrictions on their expansion. For these reasons and because it was thought that to require immediate cessation would be harsh and unreasonable, a deprivation of rights in property out of proportion to the public benefits to be obtained and, so, unconstitutional, and finally a red flag to property owners at a time when strong opposition might have jeopardized the chance of any zoning, most, if not all, zoning ordinances provided that lawful uses existing on the effective date of the law could continue although such uses could not thereafter be begun. Nevertheless, the earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible with due regard to the legitimate interests of all concerned, and the ordinances forbid or limit expansion of nonconforming uses and forfeit the right to them upon abandonment of the use or the destruction of the improvements housing the use."

Thus, this Court has recognized that the problem inherent in accommodating existing vested rights in incompatible land uses with the future planned development of a community is ordinarily resolved, under local ordinances, by permitting existing uses to continue as nonconforming uses subject to various limitations upon the right to change, expand, alter, repair, restore, or recommence after abandonment. Moreover, this Court has further recognized that the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence. *The Arundel Corp. v. Board of Zoning Appeals of Howard County,* 255 Md. 78, 83-4, 257 A.2d 142, 146 (1969); *Stieff v. Collins,* 237 Md. 601, 604, 207 A.2d 489, 491 (1965); *Colati v. Jirout,* 186 Md. 652, 655, 657, 47 A.2d 613, 614-15 (1946); *Beyer v. Mayor of Baltimore,* 182 Md. 444, 446, 34 A.2d 765, 766 (1943); *See Kastendike v. Baltimore Ass'n for Retarded Children, Inc.,* 267 Md. 389, 397, 297 A.2d 745, 749-50 (1972).

Whether a nonconforming use can be changed, extended, enlarged, altered, repaired, restored, or recommenced after abandonment ordinarily is governed by the provisions of the applicable local ordinances and regulations. *Feldstein v. La Vale Zoning Board,* 246 Md. 204, 211, 227 A.2d 731, 734 (1967); *Phillips v. Zoning Comm'r of Howard County,* 225 Md. 102, 109, 169 A.2d 410, 413 (1961); *Board of Zoning Appeals of Baltimore County v. Gue,* 217 Md. 16, 21-22, 141 A.2d 510, 513 (1958). These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses. *Mayor of Baltimore v. Byrd,* 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati,* 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore,* 180 Md. 88, 96, 23 A.2d 15, 18 (1941); *see City of Hagerstown v. Wood,* 257 Md. 558, 563, 263 A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County,* 220 Md. 48, 59, 151 A.2d 144, 150 (1959)."

Baltimore County zoning law follows the prevailing pattern of nonconforming use law. In this respect, the law here is reminiscent of the law described in Canada Tavern, Inc. v. Town of Glen Echo 260 Md. 206 (1970), where Judge McWilliams wrote:

> "We think the Council, having in mind a larger purpose, intended to align itself with those local governments which have found it desirable to delete the factor of intent in respect of the abandonment, discontinuation, or cessation of nonconforming uses rather than continuing to run the gamut of its judicial determination in a succession of infinitely variable situations."

Canada's Tavern held that expiration of the statutory period of discontinuity terminates the use. There, the lessee restaurateur closed when the liquor license was not renewed. It took time for the owner to get a new lessee to reopen. By then, the statutory period had run. The owner nevertheless applied for and got a certificate of occupancy from the Department of Inspections and Licenses, also approved by the County Attorney. Upon objection by the town, the Board of Appeals affirmed the departmental approval of the certificate, opining that the owner had diligently attempted to find a tenant to continue restaurant operation. The Circuit Court reversed, finding that the intent was irrelevant. The Court of Appeals affirmed the reversal, resulting in the denial of the certificate. Judge McWilliams emphasized the language of the statute is clear and objective.

The County Board of Appeals should and must apply a similar objective standard to the present case.

Conclusion

This case boils down to a classic nonconforming use case. The findings of the Hearing Officer in the violation cases do not have preclusive effect. Neither does the ownership of the property by Baltimore City affect the analysis. The burden is on the property owner to establish with specificity the zoning history and existence of the nonconforming use, and its continuity without material change.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2004, a copy of the foregoing Memorandum of People's Counsel for Baltimore County hand delivered to Michael Tancyzn, Esquire, 606 Baltimore Avenue, St. 106, Towson, MD 21204 and Benjamin Bronstein, Esquire, 29 Susquehanna Avenue, Suite 205, Towson, MD 21204.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Article 3

TITLE 6. CODE ENFORCEMENT

Section

Subtitle 1. Definitions

3-6-101. Definitions

Subtitle 2. Enforcement

3-6-201. County authority in general
3-6-202. Equitable relief
3-6-203. Violation - Correction notice
3-6-204. Same - Same - Remedies for failure to comply
3-6-205. Same - Code enforcement - Citation
3-6-206. Code enforcement hearing
3-6-207. Contents of a final order

Subtitle 3. Appeal to the Board of Appeals

3-6-301. Date requirements
3-6-302. Procedure for filing
3-6-303. Hearing
3-6-304. Disposition

Subtitle 4. County Action

3-6-401. Failure to comply with a final order
3-6-402. Authority

SUBTITLE 1. DEFINITIONS

§ 3-6-101. DEFINITIONS.

(a) *In general.* In this title the following words have the meanings indicated.

(b) *Code.*

(1) "Code" means the:

(i) Building Code;

(ii) Electric Code;

(iii) Mechanical Code;

(iv) Permits and licenses law and regulations;

(v) Plumbing Code;

(vi) Livability Code;

(vii) Fire Code;

(viii) Zoning Regulations; and

(ix) Any other code, regulation, or standard administered by the Department of Permits and Development Management.

(2) "Code" does not include the County Code.

(c) *Code Official.* "Code Official" means the Director of Permits and Development Management or the Director's designee.

(d) *County Code.* "County Code" means the Baltimore County Code as it is designated under § 1-1-101 of the County Code and as it relates to:

(1) Building;

(2) Electric;

(3) Permits and licenses;

(4) Plumbing;

(5) The Livability Code;

(6) The Fire Code; and

(7) Zoning.

(e) *Final order.* Final order means :

(1) The citation issued by the Code Official under § 3-6-205 of this title if the violator has not requested a code enforcement hearing in a timely fashion; or

(2) An order issued by the hearing officer:

(i) At the conclusion of a code enforcement hearing; or

(ii) If the violator fails to appear at a requested code enforcement hearing.

(f) *Hearing Officer.* "Hearing Officer" means the individual designated by the Code Official to conduct code enforcement hearings under this title.

(g) *Violation.* "Violation" means the failure to comply with a provision of:

(1) The County Code; or

(2) A code.

(h) *Violator.* "Violator" means the person charged with a violation.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

SUBTITLE 2. ENFORCEMENT

§ 3-6-201. COUNTY AUTHORITY IN GENERAL.

In addition to any other remedy authorized by law, the county or the Code Official may enforce and seek correction of a violation as provided in this title.
(1988 Code, §§ 1-7, 1-7.1) (Bill No. 181-95, § 1, 12-28-1995; Bill No. 39-97, § 1, 6-6-1997; Bill No. 46-96, §§ 1, 2, 1-1-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

§ 3-6-202. EQUITABLE RELIEF.

(a) *Authority.* The county or the Code Official may:

(1) Maintain an action in a court of competent jurisdiction for an injunction; or

(2) File a petition for equitable relief in the District Court.

(b) *Nature of the relief.* The county or the Code Official may request the court to:

(1) Enjoin a violation;

(2) Require the restoration of a property, to the extent possible, to its condition before the violation, including removal of the source of the violation; and

(3) Order other relief as may be appropriate to remedy a violation.
(1988 Code, § 1-7.1) (Bill No. 181-95, § 1, 12-28-1995; Bill No. 39-97, § 1, 6-6-1997; Bill No. 46-96, §§ 1, 2, 1-1-1997; Bill No. 31-99, § 3, 7-1-2004)

§ 3-6-203. VIOLATION - CORRECTION NOTICE.

(a) *Authority to issue.* After inspection, if the Code Official determines that a person has committed a violation, the Code Official may issue a correction notice to the violator directing the violator to comply with the requirements of the Code.

(b) *Contents.* The correction notice shall be in writing and shall describe with particularity the nature of the violation and the manner of correction.

(c) *Notice to be posted.* The Code Official shall post the notice on the property, send the notice by first class mail, or hand deliver the notice to the violator.

(d) *Correction notice not appealable.* A violator may not appeal the issuance of a correction notice.

(e) *Time for correction.* The violator shall make the correction within the time required by the correction notice.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

§ 3-6-204. SAME - SAME - REMEDIES FOR FAILURE TO COMPLY.

If a violator fails to comply with a correction notice issued under § 3-6-203 of this subtitle within the time allowed, the Code Official may pursue any authorized remedy.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

§ 3-6-205. SAME - CODE ENFORCEMENT - CITATION.

(a) *Authority to issue.* Except as provided in subsection (b) of this section, the Code Official may issue a citation to a violator who fails to comply with a correction notice within the time allowed.

(b) *Not required.* The Code Official is not required to issue a correction notice before issuing a citation if the violator has previously been issued a correction notice for which a citation was subsequently issued.

(c) *Contents of citation.*

(1) The citation issued under this section shall:

(i) Be in writing and describe with particularity the nature of the violation, including a reference to the Code or County Code provision the violator has allegedly violated;

(ii) Include any civil penalty proposed to be assessed; and

(iii) Advise the violator that the violator may contest the citation or proposed civil penalty by filing with the Code Official, within 15 days after receipt of the citation, a written request for a code enforcement hearing.

(2) The Code Official shall serve the citation on the violator in accordance with the Maryland Rules on a form prescribed by the Code Official.

(d) *Failure to request a hearing.* If the violator does not request a code enforcement hearing, the citation and any civil penalty are deemed a non-appealable final order of the Code Official.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001; Bill No. 70-03, § 43, 7-1-2004)

§ 3-6-206. CODE ENFORCEMENT HEARING.

(a) *Date set.* The Code Official shall schedule a hearing to be conducted within 30 days after the filing of a request for a hearing.

(b) *Witnesses and documents.* For good cause only, the Hearing Officer may compel the attendance of witnesses or the production of documents by subpoena.

(c) *Discovery – In general.* The Code Official and violator may obtain discovery and make inspections as provided in subsections (d) and (e) of this section.

(d) *Same – Requested by the violator.* On request of the violator, the Code Official shall:

(1) Make available to the violator any material or information in the custody of the Code Official that involves the violation charged; and

(2) Allow the violator to inspect and copy:

(i) Any portion of a document containing a statement or the substance of a statement made by the violator to a code inspection and enforcement inspector that the inspector intends to use at a hearing or trial; and

(ii) Each written report or statement made by an expert whom the inspector expects to call as a witness at the hearing or trial.

(e) *Same – Interrogatories.*

(1) Subject to paragraph (2) of this subsection, the Code Official may obtain discovery by written interrogatories.

(2) The individual who propounds the interrogatories may not serve as the Hearing Officer in any case in which interrogatories are propounded.

(3) (i) The scope of discovery is as provided in this paragraph.

(ii) Discovery may be obtained regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the alleged violations or the violator's defense of them.

(iii) It is not ground for objection that the information sought is already known to or otherwise obtainable by the Code Official or that the information will be inadmissible at the code enforcement hearing or trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(iv) An interrogatory otherwise proper is not objectionable merely because the response involves an opinion or contention that it relates to fact or the application of law to fact.

(v) On request, the violator upon whom the interrogatory is served shall attach to the response or submit for inspection the original or an exact copy of the following:

1. Any written instrument on which a defense is founded;

2. Any written report, whether acquired or developed in anticipation of an allegation that a violation exists or for the code enforcement hearing, made by an expert whom the responding violator expects to call as an expert witness at the hearing.

(4) If the responding violator fails to furnish a written report requested in accordance with this subsection, the Hearing Officer may enter any order that justice requires, including an order refusing to admit the testimony of the expert.

(5) (i) Written interrogatories may be served and directed to each person charged with a violation.

(ii) Only one set may be served of not more than 15 interrogatories to be answered by the same violator.

(iii) Interrogatories, however grouped, combined or arranged and even though subsidiary or incidental to or dependent upon other interrogatories, shall be counted separately.

(6) (i) On motion filed with the Hearing Officer within five days after service of interrogatories, the violator on whom the interrogatories were served, and for good cause shown, may request the Hearing Officer to enter an order to protect the violator from annoyance, embarrassment, oppression, or undue burden or expense.

(ii) The Hearing Officer may enter any order that justice requires.

(7) (i) The violator to whom the interrogatories are directed shall serve a response within 15 days after service of the interrogatories.

(ii) The response shall answer each interrogatory separately and fully in writing under oath, or shall state fully the grounds for refusal to answer any interrogatory.

(iii) The response shall set forth each interrogatory followed by its answer.

(iv) An answer shall include all information available to the violator directly or through agents, representatives, or attorneys.

(v) The response shall be signed by the violator making it.

(8) (i) If a violator to whom interrogatories are directed fails to serve a response after proper service of the interrogatories, the Hearing Officer, on reasonable notice to the violator, may impose sanctions if the Hearing Officer finds a failure of discovery.

(ii) The Hearing Officer may enter the orders in regard to the failure as are just, including:

1. Refusing to allow the failing violator to support or oppose designated claims or defenses;

2. Prohibiting that violator from introducing designated matters in evidence;

3. Striking out defenses or parts of defenses;

4. Staying further proceedings until the discovery is provided; or

5. Entering a finding that the violator is in violation and imposing the civil penalty as set forth in the citation to the extent the Hearing Officer considers appropriate.

(9) (i) Answers served by a violator to interrogatories may be used by the county at the code enforcement hearing or trial to the extent permitted by the Maryland Rules of Evidence.

(ii) If only part of an answer is offered in evidence, the Hearing Officer may require the offering party to introduce at that time any other part that in fairness ought to be considered with the part offered.

(f) *Final order – Nonappearance.* The Hearing Officer shall issue a non-appealable final order if the violator fails to appear at the requested hearing.

(g) *Same – Appearance.*

(1) At the conclusion of a code enforcement hearing, the Hearing Officer shall issue a final order with written findings.

(2) If the violator makes written application to the Code Official within 10 days after the final order is issued, the Code Official may modify or amend the final order.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001; Bill No. 70-03, § 43, 7-1-2004)

§ 3-6-207. CONTENTS OF A FINAL ORDER.

A final order issued under this subtitle may include:

(1) Reasonable conditions as to the time and manner of correction;

(2) A requirement to reimburse the county for any fees or costs incurred; and

(3) Any civil penalty that may be imposed.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

SUBTITLE 3. APPEAL TO THE BOARD OF APPEALS

§ 3-6-301. DATE REQUIREMENTS.

(a) *Violator to request hearing.* Within 15 days after a final order is issued under § 3-6-206(g) of this title at the conclusion of a code enforcement hearing, a violator may appeal the final order to the Board of Appeals.

(b) *Date of Board hearing.*

(1) The Board of Appeals shall hold the hearing within 60 days after the day the appeal is filed.

(2) A continuation of the Board of Appeals hearing shall be concluded within 30 days after the first hearing date.

(3) The Board of Appeals shall issue an order within 15 days after the conclusion of the Board of Appeals hearing.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001; Bill No. 70-03, § 43, 7-1-2004)

§ 3-6-302. PROCEDURE FOR FILING.

(a) *Procedural requirements to be satisfied.* The Board of Appeals may not hear an appeal unless each of the procedural requirements in this section is satisfied.

(b) *Notice of appeal filed with the Code Official.* The notice of appeal and a petition shall be filed with the Code Official, who shall forward the file to the Board of Appeals.

(c) *Contents of the petition.* The violator shall file a petition with the notice of appeal setting forth with reasonable particularity the grounds for the appeal, including:

(1) The error committed by the Hearing Officer in issuing the final order;

(2) The relief sought; and

(3) The reasons why the relief sought should be granted.

(d) *Fee and security.*

(1) A $150 filing fee shall accompany the notice of appeal and petition.

(2) (i) If the final order includes a civil penalty, the violator shall post security in the amount of the civil penalty with the Code Official in a form acceptable to the Code Official.

(ii) The Code Official shall transmit the security to the Office of Budget and Finance.

(3) (i) After all appeals are exhausted, if the civil penalty is reduced or vacated:

1. The security shall be reduced proportionately;

2. Any surplus shall be returned to the violator; and

3. The balance shall be used to satisfy the civil penalty.

(ii) If the civil penalty is not reduced or vacated, the security shall satisfy the penalty assessed and accrue to the benefit of the county.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001; Bill No. 70-03, § 43, 7-1-2004)

§ 3-6-303. HEARING.

(a) *Hearing on the record.*

(1) (i) Except as provided in subsection (b) of this section, the Board of Appeals hearing shall be limited to the record created before the Hearing Officer, which shall include:

1. Except as provided in paragraph (2) of this subsection, the recording of the testimony presented to the Hearing Officer;

2. All exhibits and other papers filed with the Hearing Officer; and

3. The written findings and final order of the Hearing Officer.

(ii) If the violator requests a transcription of the recording, the violator shall pay the cost of the transcription.

(2) In lieu of a recording, the violator and the Code Official may present written summaries of the testimony presented to the Hearing Officer.

(b) *Hearing on the joint statement.*

(1) If the violator and Code Official agree that the questions presented for Board review can be determined without an examination of the entire record, they may file a single joint statement that:

(i) States the issues and how they were decided by the Hearing Officer; and

(ii) Includes a recitation of only those facts or allegations that are essential to a decision of the issues presented.

(2) The statement, any exhibits accompanying it, and the final order of the Hearing Officer shall constitute the record in the action for Board review.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

§ 3-6-304. DISPOSITION.

(1) In a proceeding under this subtitle, the Board of Appeals may:

(i) Remand the case to the Hearing Officer;

(ii) Affirm the final order of the Hearing Officer; or

(iii) Reverse or modify the final order if a finding, conclusion, or decision of the Code Official or Hearing Officer:

1. Exceeds the statutory authority or jurisdiction of the Code Official or Hearing Officer;

2. Results from an unlawful procedure;

3. Is affected by any other error of law;

4. Subject to paragraph (2) of this section, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

5. Is arbitrary or capricious.

(2) The unavailability of a recording of the code enforcement hearing is not grounds for reversal of the final order.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

SUBTITLE 4. COUNTY ACTION

§ 3-6-401. FAILURE TO COMPLY WITH A FINAL ORDER.

(a) *Civil penalty a lien.* If a final order assesses a civil penalty or an order of the Board of Appeals affirms or modifies a final order that assesses a civil penalty and the violator does not pay the civil penalty within the time required by the order, the Code Official shall certify to the Director of Budget and Finance the amount owed, which shall become a lien on the property on which the violation existed in the manner provided in § 3-6-402 of this subtitle.

(b) *Code Official may procure performance.* If a violator fails to comply with a final order or an order of the Board of Appeals, the Code Official may procure the performance of the work needed to correct the violation in accordance with the procedure authorized in § 3-6-402 of this subtitle.
(1988 Code, § 1-7) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001)

§ 3-6-402. AUTHORITY.

(a) *Notice.* Reference to the authority of the county to undertake the measures provided under subsection (b) of this section may be included in:

(1) An injunction or other order for equitable relief issued by a court;

(2) A final order issued by the Code Official or a Hearing Officer;

(3) The Board of Appeal's order affirming or modifying the finding of a Hearing Officer; or

(4) An order to correct a building code violation issued by the Building Engineer.

(b) *Securing compliance.* Subject to subsection (a) of this section, the county may procure the performance of the work by county employees or by contract to correct a violation if a property owner fails to comply with an order to correct a violation within the time limited by the order.

(c) *Cost.*

(1) Subject to paragraph (2) of this subsection, the cost and expense of work performed under this section shall be:

(i) Certified to the Director of Budget and Finance;

(ii) A lien on the property of the owner on which the violation exists in the same manner as taxes; and

(iii) Collectible in the manner provided for the collection of real estate taxes.

(2) The costs and expenses are to be considered benefit charges and may not exceed a reasonable estimate of the special benefit conferred on the property.

(d) *Authority to enter property.*

(1) A county employee or contractor authorized by the county may enter on private lands for the purpose of correcting a violation in accordance with an order issued under this section.

(2) An owner, occupant, or agent may not obstruct, impede, or harass an employee, or contractor or their agents or employees, in the performance of their work under this section.

(1988 Code, § 1-7.1) (Bill No. 39-97, § 1, 6-6-1997; Bill No. 31-99, § 3, 7-1-2004; Bill No. 80-01, § 1, 11-23-2001; Bill No. 70-03, § 43, 7-1-2004)

TITLE 7. REGULATIONS

Section

Subtitle 1. Definitions

3-7-101. Definitions

Subtitle 2. Code of County Regulations

3-7-201. "Proposed regulation" defined
3-7-202. Scope
3-7-203. In general
3-7-204. Contents in general
3-7-205. Submission to the County Attorney
3-7-206. Procedure
3-7-207. Adoption or resubmittal
3-7-208. Severability

Subtitle 3. Other County Regulations

3-7-301. Scope
3-7-302. General approvals

SUBTITLE 1. DEFINITIONS

§ 3-7-101. DEFINITIONS.

(a) *In general.* In this title the following words have the meanings indicated.

(b) *Regulation.* "Regulation" means a statement of county government that:

(1) Has general application;

(2) Has future effect;

(3) Details or carries out a law that the county government administers; and

(4) Is in any form including:

(i) A requirement;

(ii) A standard;

(iii) A statement of interpretation; or

(iv) A statement of policy.

(c) *Rule.* "Rule" means a statement, policy, directive, or operating procedure of county government that:

(1) Concerns only internal management of the county government;

(2) Requires compliance by county employees with provisions relating to attendance, conduct, training, discipline, and procedure; or

(3) Does not affect directly the rights of the public or the procedures available to the public. (1988 Code, § 2-417) (Bill No. 88-1990, § 2; Bill No. 31-99, § 3, 7-1-2004)

SUBTITLE 2. CODE OF COUNTY REGULATIONS

§ 3-7-201. "PROPOSED REGULATION" DEFINED.

"Proposed regulation" means a regulation proposed for adoption, amendment, or repeal under this title. (Bill No. 31-99, § 3, 7-1-2004)

§ 3-7-202. SCOPE.

(a) *Applicable to departments and offices.* This subtitle applies only to regulations adopted by the agencies of the county government enumerated in §§ 503 and 504 and amended by § 502 of the Charter and which are authorized by county law to adopt regulations.

(b) *Not applicable to rules.* This subtitle does not apply to a rule adopted by a department or office. (1988 Code, § 2-417) (Bill No. 88-1990, § 2; Bill No. 31-99, § 3, 7-1-2004)

500.6 In addition to his aforesaid powers, the Zoning Commissioner shall have the power, upon notice to the parties in interest, to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations, or the proper interpretation thereof, and to pass his order thereon, subject to the right of appeal to the County Board of Appeals as hereinafter provided.

500.7 The said Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.

With respect to any zoning petition other than a petition for a special exception, variance or reclassification, the Zoning Commissioner shall schedule a public hearing for a date not less than 30 days after the petition is accepted for filing. If the petition relates 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. Whether or not a specific property is involved, notice shall be given for the same period of time in at least two newspapers of general circulation in the county. The notice shall describe the property, if any, and the action requested in the petition. Upon establishing a hearing date for the petition, the Zoning Commissioner shall promptly forward a copy thereof to the Director of Planning (or his deputy) for his consideration and for a written report containing his findings thereon with regard to planning factors. **[Bill No. 18-1976]**

500.8 He shall have the power to prescribe rules and regulations for the conduct of hearings before him, to issue summons for and compel the appearance of witnesses, to administer oaths and to preserve order.[11]

500.9 The Zoning Commissioner shall have the power to require the production of plats of developments or subdivisions of land, or of any land in connection with which application for building or use permits or petition for a special exception, a reclassification or a temporary use shall be made, such plats to show the location of streets or roads and of buildings or other structures proposed to be erected, repaired, altered or added to. All such plats shall be drawn to scale and shall clearly indicate the proposed location, size, front, side and rear setbacks from property lines and elevation plans of proposed buildings or other structures. Such details shall conform in all respects with the Zoning Regulations. No such plats or plans, showing the opening or laying out of roads or streets, shall be approved by the Zoning Commissioner unless such plats or plans shall have been previously approved by the Baltimore County Office of Planning and the Department of Public Works. **[Resolution, November 21, 1956]**

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11 **Editor's Note: See Appendix G of this volume.**

3-5-6

(6)

RE: PETITION FOR SPECIAL HEARING NE/S Mellor Avenue; 1,383' S of c/l Frederick Road (111 Mellor Avenue)	*	BEFORE THE COUNTY BOARD
1st Election District, 1st Councilmanic District	*	OF APPEALS
Legal Owner(s): D.A. Drenner Concrete, Inc Contract Purchaser(s): Linda J Amos & Susanne Gigliotti	*	FOR BALTIMORE COUNTY
Petitioners	*	Case No. 03-456-SPH

* * * * * * * * * * *

RECEIVED
JAN 27 2005
BALTIMORE COUNTY
BOARD OF APPEALS

People's Counsel for Baltimore County's Supplemental Memorandum

This memorandum supplements the hearing memorandum submitted in conjunction with the opening statement at the hearing December 23, 2004. It takes into consideration the factual record concerning the historic uses of the property at 111 Mellor Avenue. It also takes into account the zoning history, as more specifically described in the memorandum from the zoning office. People's Counsel's Exhibit 1.

The initial hearing memorandum dealt with the questions of whether or not the Hearing Officer's opinions in enforcement proceedings have any *res judicata* or preclusive effect, and whether or not Baltimore City enjoys immunity from Baltimore County zoning, so that any use during its period of ownership would be legal. People's Counsel's position remains unchanged that there is no such preclusive effect, and that Baltimore City does not enjoy immunity. On the subject of immunity, our position is reinforced by the presence of public utility uses as regulated uses under the special exception provisions of the Density Residential and Business Zones. BCZR 1B01.1C15-17, 230.13, and 411. Baltimore City's use as described in the record is analogous to a public utility use.

The initial hearing memorandum also introduced the law concerning termination of a nonconforming use based on change, abandonment, or discontinuation. In view of the record before the Zoning Commissioner, the discussion there focused primarily on the law concerning discontinuation. The present memorandum supplements that discussion based on the evidentiary record and discusses the law regarding change in more detail.

In addition, because of the preliminary motion directed to the ability of the interested citizens to participate, this memorandum will address the procedural issues. Because they are preliminary, we address them first.

I. Special Hearings; Appeals; Interested Parties

BCZR 500.7 provides broad authority for the Zoning Commissioner to conduct a hearing "as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations ... " He may initiate such hearings on his own, or at the request of an "interested person." This includes "the power ... to determine the existence of any purported nonconforming use on any premises ... "

The zoning office has given the name "special hearing" to hearings conducted under this section. This name differentiates such hearings from special exception, variance, and development plan hearings. Over the years, both property owners and other interested citizens have filed petitions for special hearings to determine both nonconforming use status and other zoning law issues. People's Counsel v. Maryland Marine 316 Md. 491 (1989); Board of Child Care v. Harker 316 Md. 683 (1989); Marzullo v. Kahl 366 Md. 158 (2002).

Here, area citizens brought the petition to determine nonconforming use status at 111 Mellor Avenue. At the zoning commissioner level, there was dispute that the citizens

had the right to file the petition. The Zoning Commissioner found that nonconforming use status had expired. Upon appeal, the property owner (now Gateway Partners) claims that the citizens lack standing because the original petitioners have moved away from Mellor Avenue. Linda Amos has moved several blocks away to the other side of Frederick Avenue. Suzanne Gigliotti Johnson has moved to Parkville. Lewis and Cindy Kubiet, who still live on Mellor Avenue, participated in the proceedings below, but were not original petitioners. The Kubiets asked for and were granted leave to become parties.

There is still a live controversy for several reasons. First of all, once a petition for special hearing is properly brought and decided, the Zoning Commissioner's decision is valid and enforceable unless overturned. While the CBA hearing is *de novo* under County Charter Sec. 603, its jurisdiction is still appellate jurisdiction. UPS v. People's Counsel 336 Md. 569 (1994). Therefore, regardless of who may be interested at this point, the Commissioner has made a determination which stands unless reversed after a hearing.

Secondly, there remain interested citizens. At the agency level, there is no requirement of proximity. We have cited on several occasions, and we repeat here, the Court of Appeals' admonitions on this subject. Dorsey v. Bethel A.M.E. Church 375 Md. 59, 71-75 (2003) reiterated recently that anyone who expresses an interest in administrative proceeding thereby becomes a party, unless excluded by a valid statute or regulation. The standard is different from and more relaxed than the "standing" principle applicable in the courts. Quoting his own opinion in Sugarloaf Citizens v. MDE 344 Md. 271, at 286-87, Judge Eldridge wrote in Dorsey:

> "The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily. In holding that a particular individual was properly a party at an

administrative hearing, Judge J. Dudley Digges for the Court in Morris v. Howard Res. & Dev. Corp ... explained as follows:

> 'He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should not be approved. This is far greater participation than that previously determined sufficient to establish one as a party before an administrative agency. *See, e.g., Baxter v. Montgomery County,* 248 Md. 111, 113, 235 A.2d 536 (1967) (per curiam) (submitting name in writing as a protestant); *Bryniarski v. Montgomery Co.,* 247 Md. 137, 143, 230 A.2d 289, 293-94 (1967) (testifying before agency); *Hertelendy v. Montgomery City.,* 245 Md. 554, 567, 226 A.2d 672, 680 (1967) (submitting into evidence letter of protest); *DuBay v. Crane,* 240 Md. 180, 184, 213 A.2d 487, 489 (1965) (identifying self on agency record as a party to proceedings); *Brashears v. Lindenbaum,* 189 Md. 619, 628, 56 A.2d 844, 849 (1948) (same). Bearing in mind that the format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation, we think that absent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings.'"

Sugarloaf Citizens v. MDE also explained that participation does not depend on success on the merits. There, Judge Eldridge wrote, at 344 Md. 295:

> "Therefore, standing to challenge governmental action, and the merits of the challenge, are separate and distinct issues. ... ('The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court and not on the issues he wishes to have adjudicated'); ... ('distinguishing between "the merits of the substantive issues decided by the Board" and whether "the appellants have the requisite standing to have those issues reviewed"') ...."

Thirdly, even if there were a stricter rule, Linda Amos still lives close enough to be affected differently from the public in general. She testified that the impact of the use on Frederick Avenue traffic in her neighborhood a half block from her house, is a particular problem. As for Lewis and Cindy Kubiet, although they were not original petitioners, they participated at the ZC level and thereby became parties. There is no question of their interest in the case.

Fourthly, while it may not have been necessary, the CBA allowed the motion of the Kubiets to be added as parties. As the record discloses, they became parties below and surely had a right to be parties at the CBA level.

For these reasons, the Zoning Commissioner decision holds unless reversed, and there are viable parties on the citizen/protestant side of the case. For the same reasons, Gateway Partners, the new property owner, may also participate as an interested party.

II. Discontinuation of the Nonconforming Use

The property is split-zoned B.M. and D.R. 2. The case has proceeded on the basis that this zoning has been in place for many years. The zoning office has confirmed that the business/residential split has been in place at least since the 1960s. People's Counsel Exhibit 1. The particulars of the residential zone have changed, but that does not affect the case. The proposed private use for a contractor's equipment storage yard is not allowed in any of the zones placed on the property for over forty years.

The early history of the site is not clear. But if we give the benefit of the doubt, based on Mr. Kubiet's testimony, that Baltimore City used the property to park utility trucks prior to the advent of zoning, then the City would have enjoyed a nonconforming use for that purpose.

But the evidence indicates that the use was discontinued on two or three occasions. In the late 1980s, the City's use ended. In the early 1990s, the City leased the property to Nicodemus Construction Company; but its use of the site was minimal at best. In about 1993, D.A. Drenner Concrete, Inc. came on the scene and leased the property. It was Drenner's expanded use for what amounts to a construction equipment storage yard which sparked neighborhood opposition and enforcement action. Drenner

eventually purchased the property in 2000. But it, too, eventually discontinued operations. The evidence is that the site was vacant from mid-2002 to mid-2004. In the latter year, Drenner sold the property to the current owner, Gateway Construction.

The gist of all this is that there were periods of discontinuity lasting more than a year both before and after Baltimore City's period of ownership. Under BCZR 104.1, a nonconforming use terminates upon discontinuation for a year or more.

There is no dispute about these periods of discontinuity. Even if Baltimore City were immune from County zoning, the last period of discontinuity came after the City sold the property. Once a nonconforming use terminates, it cannot revive.

III. Change of the Nonconforming Use.

There is yet another problem. Baltimore City's use involved the parking of utility trucks. It was apparently a relatively benign use and did not have a significant impact on the neighborhood. As noted above, it appears to have been comparable to a public utility use or storage yard. It may have been eligible for a special exception, although there is no record of any application or approval. From all indications, the Drenner operation involved different types of equipment and facilities, and had a far greater impact on the neighborhood.

Under these circumstances, the law does not favor a change in the nonconforming use by a kind of "creeping" process. Phillips v. Zoning Commissioner or Howard County 225 Md. 102 (1961). A property owner must prove both continuity and persistence of the same nonconforming use. A change or extension may come quickly or slowly. Either way, it terminates the nonconforming use. Calhoun v. County Board of Appeals of Baltimore County 262 Md. 265 (1971). In general, the law does not favor nonconforming

uses and contemplates their gradual disappearance. Prince George's County v. E.L. Gardner 293 Md. 259 (1982).

Conclusion

The record is clear that any nonconforming use has terminated because of discontinuity, change, or both. Baltimore City did not have any zoning immunity, but the conclusion would be the same if it did.

The new owner, Gateway Partners, is subject, therefore, to the use controls of the B.M. and D.R. zones, respectively. There are many business uses available, but contractor's equipment storage yard is not among the enumerated uses allowed by right or special exception.

Finally, the CBA is not bound by the findings or conclusions of Hearing Officer Stanley Schapiro in the enforcement proceeding. There is a further question as to whether he had the authority to make a nonconforming use finding there; but if so, its impact would be limited to that proceeding based on the nature of the enforcement process and the parties involved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2005, a copy of the foregoing People's Counsel for Baltimore County Supplemental Memorandum was mailed first class mail, postage pre-paid to Michael Tancyzn, Esquire, 606 Baltimore Avenue, St. 106, Towson, MD 21204 and Benjamin Bronstein, Esquire, 29 Susquehanna Avenue, Suite 205, Towson, MD 21204.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

3-5-6 (6)
RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

IN RE: Petition for Special Hearing 111 Mellor Avenue	*	BEFORE THE
	*	BOARD OF APPEALS
Gateway Partners, LLC, Successor Legal Owner; Linda J. Amos & Susanne Gigliotti, Petitioners	*	FOR BALTIMORE COUNTY
	*	CASE NO.: 03-456-SPH

* * * * * * * * * * * * *

APPELLANT'S MEMORANDUM

Gateway Partners, LLC, Successor Legal Owner and Appellant, by its attorney Benjamin Bronstein, submits this Memorandum in support of reversal of the decision of the Zoning Commissioner on the Petition for Special Hearing.

Statement of the Case

This is another proceeding predicated on the complaints by Linda J. Amos and Susanne Gigliotti neighbors against the successive owners of this property. The first proceeding was initiated before the Code Enforcement Official in 1998. The second proceeding was again initiated before the Code Enforcement Official in 2002. Both those proceedings resulted in determinations favorable to the property owner and adverse to Amos and Gigliotti. Specifically, the Code Enforcement Official found that the then property owner had established a legal nonconforming use of the property and denied Amos and Gigliotti's complaint to find that the use of the property was unlawful. (Code Enforcement Official Opinions Case # 98-2180 (CBA Exhibit 3) and Case # 00-1503 (CBA Exhibit 2).)

Unfazed by these repeated rejections of their efforts to shut down the use, Amos and Gigliotti initiated an action before the Zoning Commissioner of Baltimore County, based on the same facts and legal basis as their two earlier efforts. The Zoning Commissioner determined, contrary to the two prior decisions of the Code Enforcement Official, that a nonconforming use

does not exist on the property. From this decision of the Zoning Commissioner, the property owner has filed this Appeal before the Board of Appeals for Baltimore County.

Statement of Facts

At the time of the proceedings before the Code Enforcement Official and the Zoning Commissioner, the property owner operated a small concrete business from the premises located at 111 Mellor Avenue, located in Baltimore County. The property is primarily zoned BM with a small remaining portion of DR2, and is approximately .5 acres in size. The property is rectangular in shape, about 60' x 355', with frontage on the east side of Mellor Avenue. The property has a metal garage building and faces residential property on the west side of Mellor Avenue. The east side of Mellor Avenue is all commercial properties.

The 1998 proceeding was initiated after Amos and Gigliotti complained about alleged noise from the property in the early morning hours and the condition of the property. As a result of the complaint, the zoning inspector issued a code enforcement citation. The basis of the citation was that the property owner was conducting on the property a use not permitted in a BM zone.

At the hearing on the citation, the then owner of the property testified that the property was leased from Baltimore City starting in 1993. The evidence established that he operated a concrete business from the property, and that the property is surrounded by a chain link fence (now board on board screening on the front side) of the property which face the residences of Amos and Gigliotti.

The City of Baltimore presented testimony and evidence to show that the City had owned the property since 1923, and that since at least 1938 the property has been used as a site for the storage of heavy equipment and material for the maintenance of water and sewer facilities in the

County. Existing bins on the property were built by the City to store materials. The former owner and the City presented additional evidence that the property had been used as contractor's storage yard prior to the institution of zoning in Baltimore County.

Based on the evidence presented, the Code Enforcement Official found that the evidence produced by the former owner and the City demonstrated that the property had been used as a contractor's storage yard before the effective date of the zoning laws in Baltimore County. The Code Enforcement Official found that the former owner and the City had shown that the property had been nonconforming since the passage of the zoning laws of the County in 1945.

The Code Enforcement Official correctly observed that, in essence, the designation of a use as nonconforming use utilized to grandfather a use otherwise precluded by the subsequently enacted zoning laws. Thus, if a property was used in a certain fashion prior to the adoption of the zoning classification or regulation which might currently prohibit that use, the use may continue.

Based on the testimony and evidence before him, the Code Enforcement Official concluded that the use of the property was consistent with the prior use of the property by the City, which predated the enactment of zoning regulations in Baltimore County. As a grandfathered use, the Code Enforcement Official determined that the former owner's use of the property was not in violation of the Baltimore County Zoning Regulations. The complaint (Case # 98-2180) was therefore dismissed.

The second code enforcement violation proceeding initiated by the neighbors occurred in the Spring of 2002. As before, the former owner was charged with operating a contractor's storage not permitted in the zone without the benefit of a nonconforming use. Based on the testimony from the prior hearing, and considering the additional testimony of neighbors, the

Code Enforcement Official concluded that the prior determination that a nonconforming use existed on the property remained correct, saying "Based on the testimony in this case and the finding in the prior case, I am again persuaded that the subject property has been used as a contractor's construction storage since 1938 or earlier." (Case # 00-1503) The case was decided on August 5, 2002.

Having failed twice in their efforts to have the use terminated under the guise of a zoning violation, Amos and Gigliotti, after waiting eight months, instituted a proceeding before the Zoning Commissioner on April 12, 2003. That proceeding was based on the same facts and legal basis as the two prior actions – viz., that the operations of the former property owner on the property are illegal, despite the Code Enforcement Official twice concluding that the property has been used as contractor's storage yard "since 1938 or earlier."

The Zoning Commissioner construed the Baltimore County Code and the Baltimore County Zoning Regulations as precluding the Code Enforcement Official from making a determination on the existence of a nonconforming use – notwithstanding the clear delegation to the Code Enforcement Official of authority to hear and decide zoning violations issues. From this erroneous conclusion of the Zoning Commissioner, the present appeal has been brought.

Argument

A. The instant proceeding is barred by principles of collateral estoppel.

As a matter of law, principles of collateral estoppel preclude the complaining neighbors from maintaining this action. This issue was decided adversely to petitioners by the Court of Appeals of Maryland in the case of *Batson v. Shifflett*, 325 Md. 671, 602 A.2d 1191 (1992).

In *Batson*, the Court of Appeals adopted the following test for determining whether an administrative agency decision is entitled to preclusive effect: (1) whether the agency was acting

in a judicial capacity; (2) whether the issue presented was actually litigated before the agency; and (3) whether its resolution was necessary the agency's decision. 602 A.2d at 1202. This test was first enunciated in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845-46 (9th Cir. 1987), and its three prongs are supported by the Supreme Court case law on issue preclusion.

In *United States v. Utah Construction Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Id. At 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661.

Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court. *Batson*, 602 A.2d at 1200. Since Utah Construction Co., collateral estoppel routinely has been applied to factual determinations made by federal agencies following a fair adversarial hearing. *Batson*, supra and cases cited therein.

The rule in Maryland does not differ in any material respect from that adopted by the federal courts. See, *White v. Prince George's County*, 282 Md. 641, 658-59, 387 A.2d 260, 270 (1978) (preclusive effect given to quasi judicial proceeding of Maryland Tax Court, which is an administrative agency). Although early Maryland cases made the sweeping statement that decisions of administrative agencies can never be *res judicata*, this Court later came to recognize that the principles of public policy underlying the rule of *res judicata* were applicable to some administrative agencies performing quasi judicial functions. *Id.* At 658, 387 A.2d at 270.

In determining the test to be applied in considering whether to give preclusive effect to the decision of an administrative agency, the Court of Appeals in *Batson* recognized that such a determination hinges on three factors: (1) whether the agency was acting in a judicial type capacity; (2) whether the issue presented in the present proceeding was actually litigated in the previous proceeding; and (3) whether its resolution was necessary to the prior proceeding. 602 A.2d at 1200. This test was first enunciated in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845-46 (9th Cir. 1987), and its three prongs are supported by the Supreme Court case on issue preclusion. *Id.*

The first prong of the Exxon test is met in the instant case by the 1998 proceeding before the Hearing Examiner and by the 2002 proceeding before the Hearing Examiner. "By conducting a hearing, allowing the parties to present evidence and ruling on a dispute of law, the agency acted in a judicial capacity." *Id.* At 1202 (quoting from the opinion below, *Batson v. Shifflett*, 86 Md. App. 340, 356, 586 A2d. 792, 799, quoting *West Coast Truck Lines v. American Industries*, 893 F.2d 229, 235 (9th Cir. 1990).

The second prong of the Exxon test is whether the issue presented in proceeding in question was actually litigated in the prior proceeding to whose determination preclusive effect is sought to be given. *Batson*, 602 A.2d at 1202. In the present case, it is manifest that precisely the same issue – whether the use of the property is a nonconforming use – has been litigated twice before the Code Enforcement Official in 1998 and 2002.

The third prong of the Exxon test is whether resolution of the issue was necessary to the prior decision. *Id.* 602 A.2d at 1203. A factual issue is necessary to the determination only if its resolution is required to support the judgment entered in the prior proceeding. *Id.* In the present case the Code Enforcement Official twice determined – in both 1998 and 2002 – that the property had been used as a contractor's storage yard "since 1938 or earlier." Determination of

this fact, contested by the complaining neighbors who introduced evidence on the issue, was "required to support the judgment entered in the prior proceeding", viz., that use of the property constituted as a nonconforming use.

In light of the fact that the issue of whether the use of the property is a nonconforming use has been twice decided in the former property owner's favor, and under the principles of law enunciated by the Court of Appeals, the petitioners' claim in this proceeding is barred by collateral estoppel and must be dismissed. *Batson v. Shifflett*, supra.

Parenthetically, it should be noted that the Exxon test takes into account the distinction between *res judicata* and collateral estoppel. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Court discussed the distinction between *res judicata* and collateral estoppel, remarking that:

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Id. At 326 n. 5, 99 S.Ct. at 649 n. 5, 58 L.Ed.2d at 559 n. 5. These factors are incorporated in prongs two and three of the Exxon test, that the issues be actually litigated and necessary to the outcome of the prior proceeding. *Batson*, 602 A.2d at 1201.

This point is instructive in the instant proceeding to the issue of whether the construction of the zoning regulations is wholly within the province of the Zoning Commissioner. Regardless, the Petitioners' claim is precluded by the doctrine of collateral estoppel.

The authority of the Zoning Commissioner is set out in Title 1, Article 32-3-106, et seq. Baltimore County Code, 2003 Edition. This authority is further addressed in Section 500.7 of the BCZR, which provides the Zoning Commissioner has the authority to determine the

existence of any purported nonconforming use on any premises in Baltimore County. Additionally, under Section 500.6 of the BCZR the Zoning Commissioner is authorized to hold special hearings to determine the existence of any alleged violation of the zoning regulations.

The Baltimore County Council thereafter enacted a new Title 6 of Chapter 3 of the Baltimore County Code, entitled 'Code Enforcement' (Sections 3-6-101 through 3-6-402). This new Title was enacted as a delegation of the authority of the Zoning Commissioner's authority under Sections 500.6 and 500.7 of the BCZR. Section 3-6-201 specifically states that the Code Official "**In addition to any other remedy authorized by law,** the county or the Code Official may enforce and seek correction of a violation as provided in this title." (emphasis supplied). A "violation" is defined in Section 3-6-101(g) as "...the failure to comply with a provision of the County Code."

Both of the actions brought against the property owner by the neighbors involved a "violation" as defined in Section 3-6-101(g) – the operation of a business not permitted within a BM zone. In deciding these cases, the Code Enforcement Official was required, inter alia, to determine whether the use of the property was lawful. An assessment of whether the use was a legal nonconforming use was critical to the determination by the Code Enforcement Official of whether a violation existed.

The Zoning Commissioner concluded that because Section 500.7 authorized him to "... determine the existence of any purported nonconforming use on any premises . . ." the Code Enforcement Official could not also do so. Essentially, the Zoning Commissioner ruled that the Code Enforcement Official under Section 3-6-102 only has the authority to enforce violations that do not involve nonconforming uses. This conclusion of the Zoning Commissioner is in error,

and his further conclusion that the two prior decisions of the Code Enforcement Official that a nonconforming use existed was not preclusive was also erroneous and cannot be sustained.

The more logical and better reasoned construction of the relevant statutes is that the Code Enforcement Official and the Zoning Commissioner share authority in connection with nonconforming uses – the Zoning Commissioner on petitions for special hearing, and the Code Enforcement Official when the issue arises in connection with determining whether a violation on the Baltimore County Code or BCZR exists. The reading of Section 500.7 of the BCZR by the Zoning Commissioner limits the scope of Section 3-6-102 in contravention of the clear language by the Baltimore County Council.

Generally, statutes relating to remedies and procedure are to be liberally construed with a view toward the effective administration of justice, but they are not to given such a construction as will defeat or frustrate legislative intention. *Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 331 A.2d 55 (1975). There is a presumption that the legislative body intends its enactments to operate together as a consistent and harmonious body of law, such that no part of the statute is rendered meaningless or nugatory. *Toler v. Motor Vehicle Administration*, 373 Md. 214, 817 A.2d 229 (2003).

Where the statute to be construed is a part of a statutory scheme, the legislative intention is not to be determined from that statute alone, rather it is to be discerned by considering it in light of the statutory scheme. *Breitenbach v. N.B. Handy Co.*, 366 Md. 467, 784 A.2d 569 (2001). Statutes that are clear when viewed separately may well be ambiguous where their application in a given situation, or when they operate together, is not clear. *Id.*

The Court of Appeals presumes that the legislative body intends its enactments to operate together as a consistent and harmonious body of law; thus, when two statutes appear to

apply to the same situation, the Court will attempt to give effect to both statutes to the extent that they are reconcilable. *State v. Ghajari*, 346 Md. 101, 695 A.2d 143 (1997). All statutes which form a general scheme must be read and construed together to arrive at the intent of the legislative body. *DeBusk v. Johns Hopkins Hospital*, 342 Md. 432, 677 A.2d 73 (1996).

In a statutory scheme, when two statutes, enacted at different times and not referring to each other, address the same subject, they must be read together; i.e. interpreted with reference to one another and harmonized to the extent possible – both with each other and with respect to the other provisions of the statutory scheme. *Breitenbach, supra.* Neither statute should be read so as to render the other, or any portion of it, meaningless, surplusage, superfluous or nugatory, if two statutes in a statutory scheme, enacted at different times and not referring to each other, address the same subject. *Id.*

Statutes relating to the same subject matter or sharing a common purpose should be read together. *Farris v. State*, 351 Md. 24, 716 A.2d 237 (1998). When two statutes involve the same subject matter, have a common purpose, and form part of the same system, full effect is given to each statute to the extent possible, and a court will not add or delete words to obtain a meaning not otherwise evident from the statutory language. *Gardner v. State*, 344 Md. 642, 689 A.2d 610 (1997).

Section 500.7 BCZR and Section 3-6-102 BCC are part of a common statutory scheme relating to zoning and zoning enforcement in Baltimore County. The reading given these sections by the Zoning Commissioner renders nugatory the authority granted the Code Enforcement Official to determine violations of the BCZR. These two sections must be read and construed so as to full effect to both. *Breitenbach, supra.* In light of the fact Section 3-6-102 was enacted after Section 500.7, and that Section 3-6-101, *et seq* . are a delegation of jurisdiction

evidence further established that the former owner had purchased the property. At the hearing on the citation, the former owner testified that the property was leased from Baltimore City starting in 1993. The evidence established that the former owner operated a concrete business from the property, and that the property is surrounded by a chain link fence with screening on the front and sides of the property which face the residences across Mellor Avenue.

The City of Baltimore presented testimony and evidence to show that the City had owned the property since 1923, and that since at least 1938 the property has been used as a site for the storage of heavy equipment and material for the maintenance of water and sewer facilities in the County. Existing bins on the property were built by the City to store materials. The former owner and the City presented additional evidence that the property had been used as contractor's storage yard prior to the institution of zoning in Baltimore County.

The 1945 zoning map (see letter of People's Counsel dated January 20, 2005), clearly shows the small shed used by the City's Water Department. That shed is also shown on the 2004 zoning map. Baltimore City's use dates back to 1925 (CBA Exhibit 4). CBA Exhibit 5 clearly shows the property use as a storage yard. Mr. Kuchta's letter of March 14, 1986 (CBA Exhibit 6B) in response to Mr. Chertkoff's letter (CBA Exhibit 6A) states "Currently there is no plan to discontinue the use of the yard". The lease to Nicodemus Construction dated October 24, 1990 (Board Exhibit 9), the lease dated August 3, 1993 to the former owner (Board Exhibit 10) and the letter dated June 18, 2002 (Board Exhibit 15) from Frederick C. Grant, Chief Solicitor of City of Baltimore are compelling evidence of the continuing use of the site as a storage yard and intent not to abandon the use.

Only within the past year have there been no activities on the property – and this was due solely to compliance with the decision of the Zoning Commissioner. Notwithstanding the

cessation of active operations on the property (due to compliance with the County's directive), storage of materials continued to the present.

The determination of whether a nonconforming use has been abandoned depends upon an intention to abandon or relinquish, and some overt act, or failure to act, which carries an implication that the owner neither claims nor retains any interest in the subject matter of the abandoned use. *Stieff v. Collins*, 237 Md. 601, 207 A.2d 489 (1965). Time is not an essential element of abandonment of a nonconforming use although lapse of time may be evidence of an intention to abandon. *Id.* The temporary disuse of a nonconforming use does not amount to a surrender of the use and the owner of the property will not be deemed to have lost the right to the nonconforming use until relinquishment thereof has been clearly indicated by evidence of intention, action or inaction for a reasonable period of time. *Feldstein v. LaVale Zoning Board*, 246 Md. 204, 227 A.2d 731 (1967).

In *Kastendike v. Baltimore Association for Retarded Children, Inc.*, 267 Md. 389, 297 A.2d 745 (1972), a nursing home operation, a nonconforming use, left the premises in December of 1970 to make room for a new owner. The new utilized the premises for the care of retarded adults. Although the first resident did not move into the premises until September 1971, there was no proof of actual abandonment of the nursing-home type use of the premises. The court ruled the nonconforming use of the premises had not been abandoned within the scope of a zoning ordinance declaring such to be the case when there had been discontinuance of such for a period of 12 consecutive months or actual abandonment evidenced by removal of structures, machinery or equipment.

In the present case, the evidenced established use of the property as a contractor's storage by the City of Baltimore prior to the enactment of the BCZR. Thereafter the City leased

the property for use in the nature of a contractor's storage yard. The City thereafter sold the property to the former owner, the current owner's predecessor in title, for use as a contractor's storage yard. This evidence establishes a general chain of utilization of the property as a contractor's storage yard.

None of the testimony produced clearly shows a cessation of use of the property as a contractor's storage yard – except for the past year, in accordance with the decision of the Zoning Commissioner. Even during the past year the property was used to store materials, as testified to by the current owner of the property. Nothing more could have been done under the Zoning Commissioner's order; there is simply insufficient evidence to establish any intent to abandon or discontinue the nonconforming use of the property.

The Zoning Commissioner made a finding that the ownership of the property by the City meant the use of the property by the City could not be nonconforming. This conclusion was in error and should be reversed by this Board.

The Zoning Commissioner's ruling in this regard was premised on the observation that "[i]it is well settled that a municipality is not subject to the zoning ordinance." (Findings of Fact and Conclusions of Law at p.6). A more accurate statement of the applicable legal principle is that there is a common-law principle that the State is ordinarily not subject to its own enactments unless it clearly manifests an intent to be bound by a specific enactment. *Pan American Health Organization v. Montgomery County*, 338 Md. 214, 657 A.2d 1163 (1995). Thus, where the State acquires and uses property for State or public purposes, municipal zoning laws are not applicable to the use, since the General Assembly has neither named the State nor manifested its intention that the State be bound by the provisions of the State Zoning Enabling Act. *Mayor & City Council of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977).

At issue in a nonconforming use determination, as in the case at bar, is the issue of whether the **use** of the property in question was rendered unlawful under the zoning regulations when enacted. *Board of Zoning Appeals of Howard County v. Meyer*, 207 Md. 389, 114 A.2d 626 (1955). Where the evidence establishes that a property owner before and at the time of the adoption of the original zoning ordinance (or subsequent comprehensive rezoning) was using in a then lawful manner for a use which by this legislative action became nonpermitted, the owner has established a lawful nonconforming use. *Id.* The mere change of ownership does destroy a nonconforming use. *Kastendike, supra.* Consequently, a use transferred to a successor in interest will continue to be legal. *Id.*

The focus is on whether the **use** at the time of zoning was one which became unpermitted as a result of the legislative action. *BZA v. Meyer, supra.* In this case, the use of the property for a contractor's storage yard became unpermitted by the legislative act of the Baltimore County Council. The **use**, therefore, became nonconforming regardless of the ownership of the property. The evidence established that the **use** of the property continued until the hearing before the Code Enforcement Official. That the City of Baltimore might not have been subject to an action under the zoning ordinance does not in any respect alter the fact that the **use** of the property by the City was nonconforming as to the zoning ordinance.

Under these circumstances, it was error for the Zoning Commissioner to find that the property, and **use** thereof, did not constitute a use nonconforming to the zoning ordinance (regardless of its ownership). His decision in this regard was incorrect as a matter of law and must be overturned.

C. <u>The Amos, Gigliotti and Kubiet, Petitioners lack standing to appear in this proceeding.</u>

The two proceedings before the Code Enforcement Official and the proceeding before the Zoning Commissioner were instituted by Amos and Gigliotti whose properties were opposite to the premises at issue. The testimony has established, however, that both of these objectors have moved to locations where they are not longer specially affected by the operations on the property. As a result they no longer have standing to appear in this proceeding.

A person whose property is far removed from the subject property ordinarily will not be considered a person aggrieved, and therefore has no standing to challenge. *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967). A person whose property is far removed from the subject property ordinarily will not be deemed to have standing unless he or she meets the burden of alleging and proving by competent evidence the fact that his or her personal or property rights are specially and adversely affected by the action or activity complained of. *Sugarloaf Citizens Association v. Department of the Environment*, 103 Md. App. 269, 653 A.2d 506 (1995).

Mere allegations that protestants were citizens "within the area immediately adjacent" to the subject property, without any allegation of special damage, was held insufficient to give protestants standing to challenge. *Lawler v. Bart Realty Corp.*, 241 Md. 405, 216 A.2d 729 (1966). In addition to showing the proximity of one property to the other, facts must be demonstrated of the adverse effect the action complained of has or could have on the use, enjoyment and value of the protestant's property to establish standing. *Wilkinson v. Atkinson*, 242 Md. 231, 218 A.2d 503 (1966).

The evidence establishes that the two original Petitioners have moved to locations removed from the subject property. Gigliotti as of December 2003 moved to 7901 Tilmont Avenue in Parkville, which is on the other side of the county. Amos now resides at 21

Glenwood Avenue, which is one block north of Frederick Road and two blocks east of Mellor Avenue. The subject property is approximately two blocks south of Frederick Avenue. There is no evidence of adverse effect on them different than the public in general. Under these circumstances, neither of them has standing in this case. *Bryniarski, supra; Lawler, supra; Wilkinson, supra.*

Similarly, Louis Kubiet, who was not a party below and who now seeks to become an additional Petitioner, similarly lacks standing to appear in this case. The testimony relating to this individual did not demonstrate that his personal or property rights are specially and adversely affected by the activity complained of. Indeed, the only testimony from this individual related to the existence of the use. There was no testimony that he was specially and adversely affected. The testimony indicated to the contrary – that he could not directly see into the yard of the subject property. In light of the absence of testimony establishing that this individual's personal or property rights are specially and adversely affected by the activities on the property, he lacks standing in this case. *Bryniarski, supra; Sugarloaf Citizens Association, supra; Lawler, supra.*

D. <u>The Petitioners' claims in this proceeding are barred by the doctrine of laches</u>.

The record is clear that Amos, Gigliotti and Kubiet had knowledge of the use of the property since at least 1998, when they brought the first prior action before the Hearing Officer. The proceeding before the Zoning Commissioner, however, was not brought until April of 2003, eight months after the Order in the second Code Enforcement Official's case.

The doctrine of laches is based on the general principles of estoppel and implies that a complaining party has exhibited a lack of due diligence in asserting a right to the detriment of the

defendant. *Jahnigen v. Smith*, 143 Md. App. 547, 795 A.2d 234, certiorari denied, 369 Md. 660, 802 A.2d 439 (2002).

Laches is a defense in equity against stale claims, and is based on grounds of sound public policy by discouraging fusty demands for the peace of society. *Skeen v. McCarthy*, 46 Md. App. 434, 418 A.2d 1214, certiorari denied, 289 Md. 740 (1980).

Generally, to determine the applicable measure of impermissible delay to bar an action the doctrine of laches, if there is no action at law directly analogous to the action in equity, the general three-year statute of limitations will be used as a guideline. *Schaeffer v. Anne Arundel County*, 338 Md. 75, 656 A.2d 751 (1995).

The present proceeding is the fourth to which the property owners have been subjected by Amos and Gigliotti. Twice there has been vindication, in proceedings which clearly and unequivocally determined the property had been used as a contractor's storage yard since at least 1938 and that the use of the property was a nonconforming use. At any time during the four years since the first the determination of the Code Enforcement Official the instant action has been brought. Instead, Amos, Gigliotti and Kubiet stood by as the property was improved and used as a storage yard. The Appellant's reliance on two separate determinations that the use of the property was lawful would redound to its detriment, should the neighbors not now be precluded by laches.

Under the circumstances, Petitioners should be barred by the doctrine of laches from now objecting, years after there existed knowledge of the facts on which this claim is based. The neighbors instead utilized other avenues to halt the use of the property. Those having failed, they now cast about for yet another way to continue the assault on this small property, which continues a use of the property which has existed for at least six and one –half decades. A

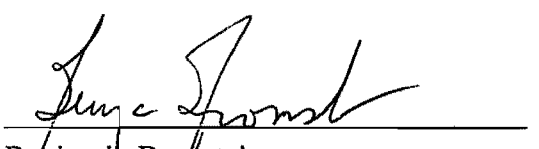
Hundred Years' War there may have been, but principles of equity -- of which laches is one – demand the neighbors' campaign cease after five.

Conclusion

1. Under the principles of law governing the preclusive effect to be given administrative decisions enunciated by the Court of Appeals in *Batson v. Shifflett*, supra, the two prior determinations of the Code Enforcement Official that the property had been used as a contractor's storage since at least 1938, and that therefore the use of the property was a lawful nonconforming use, bar the claims raised by Petitioners in this proceeding.
2. The Petitioners lack standing to appear in this proceeding.
3. The doctrine of laches bars the objectors' claims where they have had knowledge of the facts for four years prior to the institution of the action before the Zoning Commissioner during which the property owner has relied to its detriment on the two previous decisions of the Code Enforcement Official that the use of the property was lawful.

WHEREFORE, Gateway Partners, LLC, Legal Owner and Appellant respectfully requests that the relief sought in its Petition for Special Hearing be reversed and the relief requested in the Special Hearing be dismissed.

Respectfully submitted,



Benjamin Bronstein
Susquehanna Building - Suite 205
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Towson, Maryland 21204
(410) 296-0200

Attorney for Gateway Partners, LLC
Successor Legal Owner

CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on this 28 day of January, 2005, a copy of the foregoing Appellant's Memorandum was mailed, postage pre-paid to Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204 and Peter Max Zimmerman, People's Counsel for Baltimore County, Courthouse, 400 Washington Avenue, Towson, Maryland 21204.

Benjamin Bronstein

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(6)

111 Mellor Avenue N/east side Mellor Avenue, 1,383 feet south of Frederick Road 1st Election District - 1st Councilmanic District	* * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY
Legal Owner: D.A. Drenner Concrete, Inc.	* *	
Petitioners: Linda J. Amos Susanne Gigliotti Lewis Kubiet Cindy Kubiet	* * *	CASE NO.: 03-456-SPH

RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

* * * * * * * * * * * * *

MEMORANDUM OF PETITIONERS LINDA J. AMOS , SUSANNE GIGLIOTTI, LEWIS KUBIET AND CINDY KUBIET

NOW COMES Petitioners, Linda J. Amos, Susanne Gigliotti, Lewis Kubiet and Cindy Kubiet, by their counsel, Michael P. Tanczyn and submit the within Memorandum to assist the Board of Appeals in answering the questions raised in the Petition For Special Hearing.

STATEMENT OF THE CASE

This Petition was originally brought by Linda Amos and Susanne Gigliotti, who requested, by Special Hearing Petition, that the Zoning Commissioner answer questions raised therein. After hearing and review of the Memos filed by all parties, the Zoning Commissioner, Lawrence E. Schmidt, by Opinion and Order dated September 30, 2003, granted the Petition For Special Hearing, finding: 1) The subject property does not enjoy a valid non-conforming use status as a contractor's equipment storage yard; 2) That Baltimore City's use of the property did constitute an activity which made the property exempt from the Baltimore County Zoning Regulations while so utilized; 3) That Baltimore City's subsequent lease of the property is a proprietary function for remuneration, which made the property subject to the BCZR, beginning with the lease term; and 4) The Zoning

Commissioner/Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a non-conforming use. The property owner at the time, D.A. Drenner Concrete, Inc., filed a timely appeal from that decision to the Board of Appeals for Baltimore County. The matter came on for hearing before the Board of Appeals on December 22, 2004, de novo. At the hearing, the Board of Appeals was presented with motions filed by the Petitioners and the property owner, challenging the standing of the respective parties, to either maintain the Petition or maintain the appeal. The Board was also presented with a motion to add an additional Petitioner, who had participated at the hearing before the Zoning Commissioner, namely Mr. and Mrs. Lewis Kubiet, and the Board granted that motion and denied the motions challenging standing on all sides. Following conclusion of the testimony on December 22, 2004, the Board directed that memorandums be filed with the Board by January 28, 2004, close of business.

FACTS

The testimony and documentary evidence introduced at the hearing held December 22, 2004 before the Board of Appeals showed that this .1921 acre lot comprising 8,368 feet, more or less, located on the east side of Mellor Avenue, and known as 111 Mellor Avenue, was split zoned BM and DR2. By history, the property had been owned beginning February 9, 1925 by the Mayor and City Council (Respondents, Exhibit 4). According to the testimony of Lewis Kubiet, who had resided there for many decades, for many years the property was used as a maintenance yard to house a Baltimore City water department utility truck. The property contained one outdoor building and at least several concrete bins, as was shown on Petitioners' Exhibit 18, showing the City truck in the yard with the old building and the old fence taken from the neighbor's property. In approximately the late 1980's, the City generally stopped using the property, according to Mr.

Kubiet and removed existing materials from the site. Mr. Kubiet recalled the subsequent tenancy of Nicodemus Construction Company at that site under the lease made between Baltimore City and Nicodemus Construction Company, admitted as Petitioners' Exhibit 9, made October 24, 1990, calling for $275.00 a month rent with a month-to-month lease, for use as a carpentry shop and storage of materials. According to Mr. Kubiet, the use of the property by Nicodemus Construction Company was for a carpentry use with the majority of the activity taking place within the building, with very little, if any, outdoor storage by Nicodemus. After a time period of approximately a year, Nicodemus Construction Company vacated the site and it remained vacant until approximately December of 1993 when D.A. Drenner Concrete, Inc. began to use the property under a lease made with the City of Baltimore August 3, 1993 (Petitioners' Exhibit 10), by which Drenner agreed to pay $275.00 a month to use the property for the stated purpose of an office and storage of materials. The testimony of witness, Lewis Kubiet, which was corroborated by proffer by his wife, Cindy Kubiet after she first resided with him, as well as by the other Petitioner witnesses, Linda Amos, who at the time of hearing, resided at 21 Glenwood Avenue, several blocks from this site, as well as Susanne Gigliotti-Johnson, all of whom testified before the Board of Appeals.

Their testimony of the activity on the site when Drenner Concrete used the property was that it had greatly increased, to include large trucks and heavy equipment being operated with back-up alarms early in the morning and late at night, with welding activities conducted on the streets and heavy equipment being brought to the site and stored by Drenner. Their testimony was that Drenner began to move his operation from the property in approximately the spring of 2002, and no later than June of 2002 had vacated the property. The testimony of all the Petitioners' witnesses was that from the time he left, the property remained vacant until recently, in the spring of 2004, after being sold by Deed, May 20, 2004 to Gateway Partners. That Deed was introduced as a preliminary

Petitioners' Motion exhibit, as recorded in the Land Records of Baltimore County, in Liber 20092, folio 8. The testimony of the Petitioners' witnesses indicated that the activity on the property caused noise, substantial vehicular traffic, and dust in the area, causing them to file complaints with Baltimore County, which complaints resulted in the four code violation citations issued for the property and several hearings conducted in those matters under case numbers 98-2180, 99-6305, 00-0836, and 00-1503. The nature of the claimed violations was that the property was being used as a contractor's equipment storage yard, which is not a permitted use in a BM/DR2 zone. Numerous photos were admitted as exhibits in the hearing before the Board of Appeals, including those showing the trucks as utilized by Drenner and the side of the property adjacent to the building in Exhibits 3A through 3D; pictures taken in the fall of 2001, trucks and street activities; 4A through 4P. Photos taken in the winter of 2001 showed a trailer on site and construction in Exhibits 5A through 5F. Photos taken in the fall of 2002, Exhibits 6A and 6B and 7A and 7C, in the summer of 2002, showed that the property was abandoned by Drenner. Petitioners also offered the decision in the zoning reclass case decided in 1954, as Petitioners' Exhibit 8, wherein the request for industrial zoning was turned down and the property was approved for commercial use for the part that is not residential. Additional photos admitted into evidence showed that at the time of the Zoning Commissioner's hearing, in Exhibits 13A through 13C, there was a "For Sale" sign with Long & Foster, for the property, which was abandoned and locked up. Petitioners' Exhibit 14 was a photo taken by a neighbor, Jerry Jett, showing the old building and the old fence at the time when Drenner had operated it in the late 1990s and photos were admitted showing the gates open and the property totally abandoned in April 15, 2004, Petitioners Exhibit 17, as well as pictures taken December 15, 2004, showing the interior of the property, Petitioners' Exhibit 19, indicating the dumpster, Petitioners' Exhibit 20, indicating the rest of the yard in a panoramic collage, and

Petitioners' Exhibit 21, showing the fence. Petitioners' Exhibit 22 all showed the current conditions of the property as of the time of hearing before the Board of Appeals.

Petitioners' Exhibit 11 was the Deed, by which Baltimore City sold the property to D.A. Drenner in March of 2000, for $12,500.00. Petitioners' Exhibit 16 showed the multiple listing for the property as of September 19, 2002, listing the property for sale with Long & Foster, for $190,000.00. Petitioners' Exhibit 23 was the SDAT printout dated December 17, 2004, showing the property had been sold May 20, 2004 to Gateway Partners, by Drenner, by $85,000.00.

All of Petitioners' witnesses testified as to the frequency of their presence in the community and their ability to observe what went on at 111 Mellor Avenue, particularly in the time period after Drenner abandoned the property in June of 2002. Linda Amos testified as to the activity when Drenner was there. She had begun law school in September of 2001 and was studying in Scotland in the spring and early summer of 2002. When she came home the third week of July, 2002, she saw that the lot was cleared, that Drenner had moved out, and that it had stayed the same since then. Susanne Gigliotti-Johnson testified that because of her travel requirements for her job, she would frequently either work from home, as did Ms. Amos on occasion, or after travel, would come home and could observe what went on at 111 Mellor Avenue. She testified that from June of 2002, Drenner had moved from the property, and that the property remained vacant and unutilized, based on her frequent observations, until she moved from the neighborhood in 2004. Mr. Lewis Kubiet who was an office manager for the Internal Revenue Service testified that he would frequently stop by his home or work from his home, on occasion, and that he had frequent observations concerning 111 Mellor Avenue. He testified that after Drenner left sometime in June, 2002, that the property remained unused and abandoned until some time late in May of 2004. The pictures taken April 15,

2004 were corroborated by him, as well as the other photographs which he was shown, and which were introduced through him.

The only witness called by the Respondent, Gateway Partners, LLC, was Wayne Odachowski. He testified that he was a principal in Gateway Partners, LLC, which was in the business of development, insurance restoration work, which he described as rehabilitation and restoration of commercial properties, for the last 10 years. He testified after he completed college, he spent 15 years in the investment business, and the last 10 years working in the manner described, with Gateway Partners, LLC.

He stated that he had purchased the property April 9, 2004 and he had first looked at the property approximately 6 to 9 months before that. He was told that the property had been used as a contractor's equipment yard. He testified that a trailer shell onsite had concrete materials and small amounts of rebar or wood and safety fence stored in the garage. He testified that he, if allowed, hopes to use the property to store a flat utility trailer and a bobcat, and he does not intend to store heavy equipment at the site. He testified he has another site where he stores other equipment and his big equipment at another Ocean City site. He testified to the presence on the site of small amounts of rebar, lumber, steel mesh and safety fence. He testified that in the bins, he believed there were small amounts of aggregate, which he suspects were left over from Drenner's use. He did not recall whether the gate had been opened before he purchased it, and he was aware of the pending zoning case, because of the Board of Appeals sign and conversations he had with Darryl Drenner. He had not reviewed the Zoning Commissioner's Decision of September 30, 2003. He testified he has invested in real estate. He testified he did not research the zoning history of the site, or even the history of this case, and he was aware of the split zoning on the property, and was aware that a contractor's equipment storage yard was not a permitted use at this site under the

present zoning. Respondent's other exhibits introduced at the Board of Appeals from the hearing below included the listing contract of September 15, 2002 for $190,000.00, Respondent's Exhibit 1, a copy of the Code Enforcement Hearing Officer's Opinion in Case 00-1503, issued August 5, 2002, Respondent's Exhibit 2, a final Order of the Code Hearing Officer November 4, 1998, in Case 98-2180, Respondent's Exhibit 3, a Notice of Fixed Capital Record for the Catonsville storage yard, noting it was not rented, Respondent's Exhibit 5, a letter dated March 6, 1986 from Howard Chertkoff, soliciting the property from the Department of Public Works of Baltimore City, Respondent's Exhibit 6A and the reply from the Public Works Department, March 14, 1986, saying they had no plans to discontinue the yard at that time, Exhibit 6B. Respondent's Exhibit 7 was a copy of Petitioners' Memorandum to the Zoning Commissioner in this case, and Respondent's Exhibit 8 was a SDAT real property search for 108 Mellor Avenue, indicating it was sold by Susanne Gigliotti February 4, 2004, and Respondent's Exhibit 9, real property search for 110 Mellor Avenue, indicating it was sold by Stephen Amos on September 21, 2004.

People's Counsel presented one Exhibit, zoning history submitted by agreement and with the approval of the Board, after the hearing concluded December 22, 2004. That zoning history signed by W. Carl Richards, Jr. of the Baltimore County Office of Zoning indicates that the property was shown as split-zoned, BM/DR2 for the 2004, 1971 and 1960 Comprehensive Zoning Maps. It further shows that on the 1945 Zoning Maps, case 2800 was superimposed by which industrial zoning was denied to the site by Order of the Zoning Commissioner, February 5, 1954. In that Order, the property was re-zoned from A-residential to E-commercial. The case extended the zoning line about 50 to 60 feet south of the current BM/DR2 zone line.

ISSUE ONE

FOR WHAT PERIOD OF TIME WAS THE PROPERTY 111 MELLOR

AVENUE EXEMPT FROM COMPLIANCE WITH BALTIMORE COUNTY ZONING REGULATIONS (BCZR) DURING ITS OWNERSHIP BY BALTIMORE CITY?

THE PROPERTY WAS EXEMPT FROM BCZR WHILE OWNED BY BALTIMORE CITY FROM THE EFFECTIVE DATE OF ZONING IN 1945 UNTIL THE CITY STOPPED USING THE PROPERTY FOR A GOVERNMENTAL FUNCTION WHICH OCCURRED SOMETIME IN 1987 OR 1988; OR AT THE LATEST WHEN THE CITY ENTERED INTO A LEASE WITH NICODEMUS CONSTRUCTION FOR THE STATED PROPRIETARY USE AS "A CARPENTRY SHOP AND STORAGE OF MATERIALS" ON OCTOBER 24, 1990 WITH A START DATE OF NOVEMBER 1, 1990.

The BCZR define non-conforming use in §101 as "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use (Bill No. 18-1976)" Non-conforming uses are regulated under provisions of BCZR 104.1, which allows non-conforming uses to continue unless any of the following circumstances occur:

1. change from non-conforming use to any other use whatsoever; or
2. abandonment of non-conforming use for one year or more; or
3. discontinuance of non-conforming use for one year or more.

If any of these are met, BCZR 104.1 states the non-conforming use shall terminate.

Maryland Courts have consistently espoused as a general and well established policy against the expansion of non-conforming use and favored strict construction of local ordinances and regulations "to effectuate the purpose of eliminating non conforming use". Trip Associates Inc. v. Mayor & City Council of Baltimore, 151 Md. App. 167, 824 A2d 977 @ 982 (2003). Citing County Council v. Gardner, Inc., 293 Md. 259, 268 (1982) Colati v. Jerout, 186 Md. 652, 655 (1946).

In this case, due to the City's ownership of the property purchased in 1925 until sold by deed March 10, 2000 to D.A. Drenner Concrete, Inc. for $12,500, the threshold issue of an exemption period from the BCZR due Baltimore City is presented. Baltimore City is exempt from the BCZR

when enacted into law, so long as it is utilizing the property for a governmental function; but it is subject to such restrictions when it is engaged in a proprietary function. American Law of Zoning §9.03.

Maryland follows that doctrine. In Youngstown Cartage Company v. North Point Peninsula Community Coordinating Council, et al., 24 Md. App. 624 - 631 332 A2d 718, 84 ALR 3d 1181 (1975), the Maryland Court of Special Appeals held that

> "When the State acquires land and then leases or rents that land to a private person or concern for a private use, the land is subject to local zoning ordinances or regulations so long as it is so leased or rented."

The State had acquired land in Baltimore County for its tunnel project. Because it had no immediate use for the property, the State leased the entire 2 acre tract to Youngstown Cartage for a trucking terminal. When Baltimore County received a zoning complaint about that use it initiated proceedings. After hearing, the DZC held that BCZR applied to the leased lands.

On appeal the Board of Appeals rejected the State's view that the Board had no jurisdiction because the State owned the land and decided the case adversely to Appellant. The Circuit Court affirmed the Board holding.

> "There is no question that the property, although State owned, is being used for private enterprise via a landlord-tenant relationship. No public use is being made of this property, therefore, it must be zoned in accordance with the zoning regulations before private use may be made of it. Id @ 627.

In affirming the Circuit Court, the Court of Special Appeals rejected the State's ownership argument "because the land in the case now before us is not put to the public use." Id @ 628-630, tracing the definition in caselaw of public use.

Applying that holding to the facts established in this case, the Mayor and City Council's lease with either Nicodemus Construction in 1990 or Drenner in August, 1993 would subject the

property to the BCZR which never allowed contractor's equipment storage yards as a permitted use or use by special exception in the zoning for the site at those times.

Further, by the residents' testimony, the City ceased using the property for a utility yard sometime in 1987 or 1988 which is after the time period in which letters were exchanged in 1986 (Drenner, Exhibit 6A, 6B).

ISSUE TWO

DOES 111 MELLOR AVENUE ENJOY A VALID NON-CONFORMING STATUS AS A CONTRACTOR'S EQUIPMENT YARD?

NO, IT DOES NOT AND IT IS UNDISPUTED THAT NO PETITION FOR SPECIAL HEARING WAS EVER FILED BY THE PROPERTY OWNER REQUESTING THE ZONING COMMISSIONER FIND A VALID NON-CONFORMING USE EXISTS. FURTHER, THE CHANGE OF USE WITH THE NICODEMUS LEASE FOR A CARPENTER SHOP PERMITTED IN A BM ZONE MARKS THE ABANDONMENT OF THE NON-CONFORMING USE WITH THE USE OF THE PROPERTY FOR A PERMITTED USE. FURTHER, THE DISCONTINUANCE OF THE ALLEGED NON-CONFORMING USE FOR PERIODS OF TIME IN EXCESS OF ONE YEAR PRIOR TO THE NICODEMUS LEASE; NAMELY THE 18 MONTH PERIOD BETWEEN THE NICODEMUS LEASE END AND THE DRENNER LEASE, WHEN THE PROPERTY WAS VACANT AND UNUSED, AND FROM JUNE, 2002, WHEN DRENNER VACATED THE PREMISES THROUGH SOME TIME IN MAY, 2004, WHEN IT WAS VACANT AND UNUSED, PROVIDE A MULTITUDE OF EXAMPLES OF DISCONTINUANCE AND ABANDONMENT OF USE, WHICH TERMINATES A NON-CONFORMING USE, UNDER BCZR 104.1.

As was noted in the Zoning Commissioner's Findings of Fact And Conclusions of Law, Baltimore County is a Charter County, pursuant to the provisions of Article 25A of the Annotated Code of Maryland. The Charter was adopted by the voters of Baltimore County November 6, 1956. The Charter establishes the structure of County government and Section 522 thereof establishes the Office of the Zoning Commissioner.

The authority of the Zoning Commissioner is set forth in the 2003 Baltimore County Code. Sections 3-2-1103, 3-2-1201, 3-2-1203, 32-1-102 thereof sets out the method of appointment of the Zoning Commissioner. Baltimore County Code 2003, Sections 32-3-301 provides for the authority

of the Zoning Commissioner. It is also to be noted that Sections 32-3-102, 32-3-601, 32-3-605 of the Code establishes the process for zoning violations. Those Sections also provide that the Director of the Department of Permits and Development Management shall interpret and enforce the County's zoning regulations. Indeed, Code Hearing Officer Shapiro's office and authority is founded upon that Section. The BCZR also established the authority of the Office of the Zoning Commissioner. BCZR §500.7 empowers the Zoning Commission to conduct a hearing to determine the existence of any purported non-conforming use on any premises. That was never done, and so no valid non-conforming use can exist without that. The property owner's reliance on decisions rendered by Stanley J. Schapiro as Code Enforcement Hearing Officer in cases 98-2180 and 00-1503 regarding 111 Mellor Avenue are unavailing for several reasons.

First, the Code Enforcement Hearing Officer's position, created by 1992 legislation, has no authority to grant a non-conforming use. The Zoning Commissioner, a charter office, alone possesses that power.

Second, Baltimore County has recognized the lack of jurisdiction of the Code Enforcement Hearing Officer by requiring code enforcement complaint respondents who claimed a non-conforming use to Petition the Zoning Commission by Special Hearing to seek a non-conforming use determination. The Code Enforcement action would be routinely stayed to allow that to occur. Perhaps because of the friendship between Benjamin Bronstein (Drenner's attorney) and Stanley Schapiro, that policy was not followed in those cases where Mr. Schapiro dismissed the Complaints. For anyone who believes the law should be applied equally to all subject to it, Mr. Schapiro's decisions are impossible to reconcile.

ISSUE THREE

DOES THE DOCTRINE OF "RES JUDICATA", BASED ON THE CODE ENFORCEMENT HEARING OFFICER STANLEY SCHAPIRO'S DECISION IN

THE CODE ENFORCEMENT CASE 98-2180 AND 00-1503 APPLY AS A BASIS TO DISMISS THE RESIDENTS INSTANT SPECIAL HEARING PETITION?

NO, FOR A VARIETY OF REASONS.

First, Mr. Schapiro, as Code Enforcement Hearing Officer, had no authority to grant a non-conforming use or make that determination. Only the Zoning Commissioner has that authority, under the code sections previously cited. Second, Mr. Schapiro was wrong on the law and the facts applicable to this case. Third, when acquainted with additional facts in the later case, Mr. Schapiro failed to make findings of fact to address the matters of record, including proprietary leases, abandonment of use, and discontinuance of use. It is clear from Appellate Court decisions, that the doctrine of res judicata/Issue Preclusion is sparingly applied to decisions of administrative bodies.

The Court of Special Appeals in Board of County Commissioners of Cecil County v. Racine, 24 Md. App. 435, 332 A2d 306 (1975) concluded its opinion rejecting the application of "res judicata" in that case as follows:

> "Mistaken interpretations of law, however honestly arrived at are held not to be within the exercise of sound administrative discretion and the legislative prerogative, but to be arbitrary and illegal. Perpetuation of illegality by an administrative body by inflexible application of the principle of res judicata is impermissible."

Petitioners adopt the argument from the previous issue, establishing that Stanley Schapiro had no jurisdiction or authority to find the non-conforming use or to make a determination after Special Hearing, for reasons cited and incorporated herein without repetition. Second, Mr. Schapiro erred both as to the law and the facts invoking, at the urging of Drenner's counsel, the doctrine of res judicata in this matter. In determining whether res judicata should be properly applied in this case, the decision of the Court of Appeals in MPC, Inc. v. Billy Kenny, 279 Md. 29, 367 A.2d 486 (1977) is instructive.

> "The doctrine of res judicata is that a judgment between the same parties and [367 A.2d 489] their privies is a final bar to any other

suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit...." (Emphasis added).

"The delineation between res judicata and collateral estoppel was expressed in Sterling v. Local 438, 207 Md. 132, 140-41, 113 A.2d 389, 393, cert. denied, 350 U.S. 875, 76 S.Ct. 119, 100 L.Ed. 773 (1955):"

"... If the second suit is between the same parties and is upon the same cause of action, a judgment in the earlier case on the merits is an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated (res judicata). If, in a second suit between the same parties, even though the cause of action is different, any determination of fact, which was actually litigated in the first case, is conclusive in the second case (collateral estoppel)." (citation omitted) Id. @ 32

The Court set forth, as followed in Maryland, as to whether the same evidentiary facts would sustain both actions.

"The measure which seems to find favor with most courts, and one which we have applied, is whether the same evidentiary facts would sustain both actions. Id. @ 33

The fallacy of invoking res judicata in this matter, as was done by the Code Enforcement Hearing Officer, Mr. Schapiro is the same reason why the Board of Appeals should reject the request that they apply that doctrine to dismiss the instant Special Hearing position.

"The basic rule of res judicata is that facts or questions which were in issue in a previous action and were therein determined by a court which had jurisdiction of the parties and the subject matter are conclusively settled by a final judgment in the first case and may not again be litigated in a subsequent action between the same parties or their privies even though the subsequent suit takes a different form or is based on a different cause of action."

"There is substantial authority that the doctrine of res judicata itself should not be rigidly applied where the prior judgment or decree was the product of error of law. In 46 Am.Jur.2d, Judgments, s 416, it is said:

"There are cases stating that the doctrine precluding the relitigation of issues previously adjudicated in an action on a different cause of action, is confined to issues of fact or, at least, to mixed questions of fact or law, and thereby excluding questions of law from the operation of the doctrine. Under this rule, the doctrine does not extend to erroneous propositions of law applied by the court in reaching its decision."

"An analogous rule is announced in Restatement of the Law of Judgments, s 70, at 318, where it is said:

"Where a questions of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; and in any event it is not conclusive if injustice would result."

"In comment f. of the above quoted Restatement rule it is said at 324:"

"Where injustice would result. The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons." (Italics supplied.) Id.@ 447-448 ...If, as here, the court rendering the earlier judgment had jurisdiction of the parties and the subject matter, the fact that its final judgment was erroneous or irregular will not prevent that judgment from acting as a bar to a relitigation of the cause of action which was merged in the judgment." (Italics supplied.)

"Should such an inflexible rule of law be made applicable to errors of law by administrative bodies? We think not."

"We recognize, as indeed we must, that an unreversed final decision by a zoning board, passed in the exercise of its discretion upon issues of fact or upon mixed issues of law and fact are fully binding upon the parties to the cause and their privies as to all issues determined thereby. It is only when there has been a substantial change of conditions or it is shown that the decision was the product of fraud, surprise, mistake, or inadvertence, that such an administrative body may reverse its prior decision in litigation between the same parties. Whittle v. Board of Appeals, supra;

Woodlawn Assn. v. Board, supra; Gaywood Association v. MTA, 246 Md. 93, 227 A.2d 735. Id. 450, 451.

A property owner may not defend against a code violation citation by asserting the existence of a non-conforming use. BCZR 500.7 provides the special hearing as the explicit and exclusive remedy for a property owner to establish or legitimize such a use. When proceeding, under BCZR 500.7, the burden is on the property owner affirmatively to establish the existence of the non-conforming use. It should be significant to the Board of Appeals that there was not one shred of testimony from the Respondent in this case to affirmatively establish the elements of a continuous uninterrupted non-conforming use at this site, or to satisfactorily deal with facts present, which suggest, under BCZR 104.1, not only extensive and numerous abandonments of the non-conforming use, but also change to a permitted use with the lease for the carpentry shop. The Respondent's presentation suggested a claimed non-conforming use status as a vested right to be disproven by the Petitioners in this case, which is not in accord with the requirements of BCZR 500.7 or 104.1, which places the burden of proof on the property owner, to affirmatively establish the continuous existence of a valid non-conforming use.

In examining Mr. Schapiro's decisions in citation 98-2180 and 00-1503, it becomes clear that the parties are not the same, since Baltimore County was the instigating party in that case. Secondly, Mr. Schapiro had no jurisdiction to decide non-conforming uses. He acted against the long standing policy invoked by him in similar cases with other Respondents who claimed a non-conforming use, by not requiring Drenner to petition, by Special Hearing, and staying the Code Enforcement action pending receipt of a final decision from the Zoning Commissioner on the non-conforming use status. His decision in 98-2180 makes findings only that the City owned the property since 1923, in the deed, citing a City exhibit. While the deed in the present case indicates

the City bought the property in 1925, in that decision there is no mention of the lease from the City to Nicodemus Construction or the purposes for the lease, nor were either of the leases between the City and Nicodemus or Drenner presented to the Code Enforcement Hearing Officer. Most importantly, in the second last paragraph of that decision, he makes a finding of a non-conforming use, without using those words and on that basis, then says, "based on the uncontradicted, the Respondents should be dismissed." Ignoring the fact that that is gibberish, in fact he had no jurisdiction or authority to make such a determination, and the County policy followed by Mr. Schapiro in other cases was not to make that determination, but to properly defer to the code position of Zoning Commissioner, which has authority, under BCZR §500.7 to conduct those hearings and make those determinations. In his decision in code enforcement case 00-1503, again he finds that the Respondent's use of the property for a contractor's storage yard, "which is not a permitted use of right in an FM zone" makes and misstates the size of the property as .5 acres and that "some of the neighbors said the property was not used as a contractor's storage yard for a period of time." Again there is no mention of the leases between the City and Nicodemus or Drenner, and neither a discussion nor a decision concerning the City's exemption from the BCZR and loss of that exemption when the property was leased for a proprietary or non-governmental purpose through Nicodemus and Drenner.

Upon analysis, the effect of Mr. Schapiro's decisions in both cases were to protect the proprietary use of the property, illegally, as a contractor's equipment storage yard, under a finding of non-conforming use, which Mr. Schapiro had no jurisdiction or authority to find as a matter of law. Those decisions cumulatively have the effect of continuing to visit upon the residents of the community, even more intense activity on the part of Drenner Concrete, it's equipment and

employees at early hours of the morning through late hours at night, by perpetuating an illegal non-conforming use at the site.

Third, Mr. Schapiro failed to take cognizance of the statue with regard to discontinuance of use or abandonment of use, either of which would have been bases of which to make a proper finding that a non-conforming use could not have applied to this site on the facts applicable to this case. McKemy v. Baltimore County, 39 Md. App. 257, 385 A.2d 96 (1998) In applying the McKemy holding to the facts of this case, the use made by the City for a single vehicle used to take care of water distribution lines with a shed for storage of materials and several open bins should be contrasted with the tremendous expansion of the property use by activity amount and number of pieces of equipment, as utilized by Drenner Concrete. The McKemy court stated that a proper determination of §104.1 of the Baltimore County non-conforming use regulations would have required:

> "In deciding whether the current activity is in the scope of the non-conforming use, the Board should have considered the following factors:
>
> 1. To what extent does the current use of these lots reflect the nature and purpose of the original non-conforming use?"

In the instant case, the use at the time of Nicodemus as a carpentry shop and storage of materials, which was done inside the shed, was a permitted use in a commercial zone and the use by Nicodemus for a permitted use would, under operative law, have terminated the non-conforming use, once the property was then used in a manner and use called for under the statute.

> 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?"

As to that factor, the testimony regarding the City's use of the property was that it was used for storage of materials and parking of a truck. In Drenner's case, many more pieces of equipment

and trucks were there, maintenance was done on the trucks and manufacturing activity, such as cutting up rebar or concrete forms was being done by Drenner during his time at the property. Prior to his utilization of the property, Nicodemus had used the property for storage of carpentry materials and not for parking any vehicles at the site, for the time period of his proprietary lease.

3. "Does the current use have a substantially different effect upon the neighborhood?"

Based on the testimony of the residents, the hours of operation had greatly expanded the area of the site which was utilized and the number and amount of equipment utilized by Drenner, as well as the activities taking place, cutting up rebar, running backhoes up and down Mellor Avenue, with back-up alarms going off in the wee hours of the morning until late at night, would have a substantially different effect, as testified to by the neighbors.

4. "Is the current use a drastic enlargement or extension of the original non-conforming use?"

Again, the City had one truck there next to a shed building and with open bins. The use by Drenner was greatly expanded, and would constitute, under the Court of Special Appeals test, a drastic enlargement or extension of the original non-conforming use beyond that permitted by law. Further, there was ample testimony before the Board of Appeals in the instant case, not only of a change to a use as a carpenter shop by Nicodemus under its lease, but periods of abandonment by Drenner, going back to more than a year prior to the time of hearing in this case. The testimony was that Drenner had moved from the site in June of 2002, except for one or two pieces of equipment kept at the property, which had been subsequently removed from the site. The residents testified as to abandonment of this site by Drenner when he purchased, in April or May of 2002, other land in Jessup, Maryland, where he has operated his business since he moved from this site in June of 2002.

Therefore, there are numerous factors on which the Board of Appeals, in the instant case can, and should, conclude the following:

1. That the property does not enjoy and never did enjoy a valid non-conforming use.

2. That when Nicodemus construction leased the property for a carpentry shop and storage of related materials, that was a permitted use under the BM zone and that, in and of itself, would have terminated any claim of non-conforming use.

3. That Drenner's lease stated the property was to be used for office use and storage of materials. It mentions nothing of perpetuation of a contractor's equipment storage yard as a permitted use under the lease. Other provisions of the lease, which may be seen as boilerplate call for operation of the property by use in accordance with the law. The law prohibited the use at all times, which Mr. Drenner used the property for in a BM or a DR2 zone.

4. The doctrine of res judicata has no application in this case. Code Enforcement Officer Schapiro had no authority to make a non-conforming use determination. Under those circumstances, the doctrine of res judicata has no application in this matter.

5. That the abandonment of the premises for the time periods of more than a year between the Nicodemus and the Drenner lease; from June, 2002 through late May, 2004; and Baltimore City's abandonment of the use of the property as a storage yard for several years in the late eighties, prior to the Nicodemus lease all provide independently sufficient examples of abandonment under BCZR 104.1 to terminate the non-conforming use.

CONCLUSION

For the foregoing reasons and authorities Petitioners request that the Board of Appeals answer the questions asked in the Special Hearing Petition as follows:

1. For what period of time was the property, 111 Mellor Avenue exempt from

compliance with Baltimore County Zoning Regulations (BCZR) during its ownership by Baltimore City?

That the City enjoyed an exemption until Nicodemus Construction rented the property in 1990. Thereafter the property became used for a permitted purpose under BM zone and any claim of non-conforming use would have terminated for that reason; or because of the abandonment or discontinuance of the use by subsequent tenant and owner, Drenner Concrete. Further, Drenner Concrete's lease called for use of the property as an office and storage of materials and for use of the property, in accordance with law, which also would have terminated any claim of non-conforming use.

2. Does 111 Mellor Avenue enjoy a valid non-conforming status as a contractor's equipment yard?

No.

3. Does the doctrine of res judicata, based on the Code Enforcement Hearing Officer Stanley Schapiro's decision in the Code Enforcement Case 98-2780 and 00-1503 apply as a basis to dismiss the residents instant Special Hearing Petition?

No, for a variety of reasons.

4. Does the Zoning Commissioner solely have authority, under Baltimore County Charter and Code, and particularly BCZR 500.7, to make determinations of non-conforming use, the exercise of the Zoning Commissioner's charter power to interpret the zoning regulations.

Yes.

Respectfully submitted,

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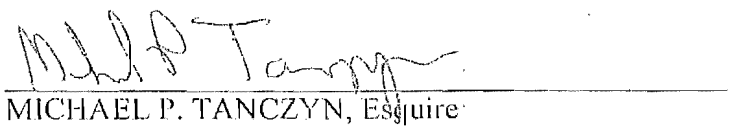
Towson, Maryland 21204

(410) 296-8823
Attorney for the Petitioners,
Linda Amos, Susanne Gigliotti-Johnson, Lewis Kubiet and Cindy Kubiet

CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 28th day of January, 2005, , a copy of the foregoing Memorandum of Petitioners Linda J. Amos, Susanne Gigliotti-Johnson, Lewis Kubiet, and Cindy Kubiet, was mailed to Peter Max Zimmerman, Esquire, Peoples' Counsel for Baltimore County, Room 47, 400 Washington Avenue, Towson, Maryland 21204 and to Benjamin Bronstein, Esquire, Ste. 205, 29 W. Susquehanna Avenue, Towson, Maryland 21204-5218, Attorney for Gateway Partners, LLC, Respondent.



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BOARD OF APPEALS OF BALTIMORE COUNTY
POST-HEARING BRIEFS
IN THE MATTER OF: DA DRENNER; GATEWAY PARTNERS

DATE: January 28, 2005

TO: L.Wescott
M. Brassil
J. Quinn

FROM: Kathi

SUBJECT: Case No. 03-456-SPH / *In the Matter of: D. A. Drenner Concrete* - Additional Letter from People's Counsel

Received the attached letter from Peter Zimmerman, after I mailed out to you the post-hearing memos in this case, in which he submits a copy of the Board's decision in *Ramsey/Savader* which was issued on 1/27/05 (Peter indicated that he received his copy of *Ramsey* on 1/28/05). (Same CBA panel on both cases as pointed out by Peter.)

kathi

Attachment

Baltimore County, Maryland
OFFICE OF PEOPLE'S COUNSEL
Room 47, Old CourtHouse
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Towson, MD 21204

410-887-2188
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PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

January 28, 2005

RECEIVED
JAN 28 2005
BALTIMORE COUNTY
BOARD OF APPEALS

Lawrence S. Wescott, Esquire, Panel Chairman
County Board of Appeals
400 Washington Avenue, Room 49
Towson, Maryland 21204

Re: D.A. Drenner Concrete, Inc
111 Mellor Avenue
Case No.: 03-456-SPH

Dear Chairman Wescott,

This letter supplements our post-hearing memorandum by the addition of the enclosed County Board of Appeals opinion dated January 27, 2005, which we just received. The opinion in Case No. 04-250-SPH, In the Matter of Howard Ramsay; Louis and Nita Savader, 2108 Alma Avenue concerns discontinuity of a nonconforming use.

Our office participated in the Alma Avenue case. Our position there is consistent with our office's position in the present case that BCZR 104.1 establishes an objective standard or test for discontinuity of a nonconforming use.

The County Board of Appeals agreed in Ramsay/Savader that the standard is objective. Coincidentally, the same CBA panel which decided that case is presiding in the present case.

Accordingly, we believe that consideration of this opinion will be helpful to the County Board of Appeals in its deliberations here.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

Carole S. Demilio

Carole S. Demilio
Deputy People's Counsel

PMZ/CSD/rmw
Enclosures

cc: Michael Tanczyn, Esquire
Benjamin Bronstein, Esquire

IN THE MATTER OF THE APPLICATION OF HOWARD RAMSAY – LEGAL OWNER; NITA AND LOUIS SAVADER – C.P. FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE W/S OF LIGMAN AVE., NW/COR OF ALMA AND LIGMAN AVENUE (2108 ALMA AVENUE) 15TH ELECTION DISTRICT 7TH COUNCILMANIC DISTRICT	* BEFORE THE * COUNTY BOARD OF APPEALS * OF * BALTIMORE COUNTY * CASE NO. 04-250-SPH

* * * * * * * * *

OPINION

Background

The property in question is in Edgemere on Jones Creek in the Chesapeake Bay Critical Area. It is comprised of .66 acre zoned D.R. 5.5. The Whistler Corporation bought the property in 1988. At that time there were four single-family dwellings, in excess of the maximum three allowed by multiplying 5.5 x .66. The property also appeared to have setback problems. In the course of rehabilitating the property, Whistler was advised that it had to establish the legitimacy of the nonconforming use of the property. In 1989, the Whistler Corporation, through Howard Ramsay, applied to the Baltimore County Zoning Commissioner for a determination that the subject property was a lawful nonconforming use. The then-Deputy Zoning Commissioner, in Case No. 89-343-SPH, decided that "the subject property consisting of four single-family dwellings has not changed since 1935 and pre-dates the 1945 zoning regulations and that a nonconforming use existed."

In 1989 the Whistler Corporation filed with the State of Maryland for a condominium regime and thereafter rebuilt the four older homes into the newer units which existed on the site at the time of the particular incident in question.

In March 2001, the house at 2108 Alma Avenue was destroyed by a tenant who was residing in the dwelling at the time. He permitted water to overflow and completely damaged the interior of the home to the point that the then-owner, Howard Ramsay, for safety and health reasons, obtained a permit from Baltimore County to raze the property. The permit was issued on March 21, 2001 and the property was razed on or about November 21, 2001.

Due to financial reasons and Mr. Ramsay's inability to secure competent contractors, Mr. Ramsay was unable to start the reconstruction of 2108 Alma Avenue.

Ramsay, and Chris Barkley, his realtor, approached Baltimore County in October 2003. Ramsay and Barkley, as well as the County, recognized that Ramsay needed to take some action to restore 2108 Alma Avenue before the expiration of the 2-year period set forth in BCZR § 104.2. That section states:

> A structure damaged to any extent or destroyed by fire or other casualty may be restored within two (2) years after such destruction or damage but may not be enlarged.

Mr. and Mrs. Louis Savader purchased the properties when it was apparent to Mr. Ramsay, due to his financial situation, that he would not be able to rebuild the house. A Petition for Special Hearing was originally filed by Barkley on behalf of Ramsay requesting "extension of the zoning case #89-343-SPH." The Petition was filed on November 14, 2003, and subsequently amended to include a longer explanation of the need for the extension of the two-year period permitted under § 104.2.

The Zoning Commissioner denied the special hearing and refused to extend the two-year limit permitted for rebuilding or restoring a nonconforming use under § 104.2.

People's Counsel raised several questions in its Brief to the Board. The Board feels that the following questions are pertinent to his matter.

1. Has there been a termination of the nonconforming use?
2. Can the two-year period for restoration lawfully be extended?
3. Has there been compliance with BCZR 500.14 for applications in the Chesapeake Bay Critical Area?

Decision

Nonconforming uses are defined in BCZR § 101 as follows:

> A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

BCZR § 104 governs these uses and states in pertinent part:

> 104.1 A nonconforming use (as defined in § 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 for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

104.2 A structure damaged to any extent or destroyed by fire or other casualty may be restored within two years after such destruction or damage but may not be enlarged. In the case of residential use structures which are nonconforming in density, the number of dwelling units or density units rebuilt may be equal to but may not exceed the number of units which existed before the casualty.

BCZR 500.14 deals with zoning petitions within the Critical Area. It states:

Within the Chesapeake Bay Critical Area.

No decision may be rendered by the Zoning Commissioner on any petition or special exception, variance or special hearing unless the Zoning Commissioner has received from the director of the department of environmental protection and resource management, or his designated representative, written recommendations describing how the proposed requested would:

A. Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have run off the surrounding lands;

B. Conserve fish, wildlife, and plant habitats; and

C. Be consistent with established land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also adjust the fact that, even if pollution is controlled, the number, movement and activities of persons in that area can create adverse environmental impacts.

Nonconforming uses are generally not looked upon with favor by governmental entities. In general, the policy of the law is to eliminate nonconforming uses over time. *Prince George's County v. E. L. Gardner,* 293 Md. 259, 267-68 (1991).

In the opinion of the Board,, §§ 104.1 and 104.2 of the BCZR are quite clear with respect to the requirements for nonconforming uses. Section 104.1 states that "a nonconforming use (as defined in § 101) may continue except as otherwise specifically provided in these regulations…." [Emphasis supplied.] Section 104.2 allows for a structure that has been damaged or destroyed by other casualty to be restored within 2 years after such destruction or damage. Neither § 104.1 nor § 104.2 provides for any extension or enlargement of the 2-year period.

Petitioner argues that the use of the word "may" in § 104.2 rather than the word "shall" indicates that the Council made the provision "permissive" and not mandatory. The Board takes issue with this interpretation of the language of § 104.2. Section 104.2 states "a structure damaged to any extent or destroyed by fire or other casualty may be restored within two (2) years after such destruction or damage but may not be enlarged. In the case of residential use structures which are nonconforming in density, the number of dwelling units or density units rebuilt may be equal to but may not exceed the number of units which existed before the casualty." [Emphasis added.]

In our opinion it is clear that the word "may" after the word "casualty" indicates that the owner has the right to restore the structure or not restore the structure. The word "may" does not modify the 2-year period for reconstruction. In addition, the use of the word "may" when referring to the number of units again is permissive. It certainly cannot be contended that the use of the word "may" in the last lines of the section would allow more density units to be rebuilt than were originally found in the nonconforming use.

The owners of the unit contend they intended to reconstruct the unit and were prohibited from doing so by the fact that they did not have sufficient funds to undertake a reconstruction project until after the whole condominium was sold. At that point, the owners did not have an opportunity to rebuild the property since there was no time to obtain a building permit, and also there was interference from Hurricane Isabel which occurred at some point during that period of time. While we are sympathetic with the position in which the Petitioners found themselves, unfortunately, the law does not make any provision for this situation. Section 104.1 states in part, "...provided that upon any change from such nonconforming 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."

In our opinion, this language is clear that regardless of the intent of the parties, if the use is abandoned or discontinued for a period of one year or more, the nonconforming use is lost. *See Canada Tavern Inc. v. Town of Glen Echo*, 260 Md. 206, 271 A.2d 664 (1970). Section 104.2 allows the owner of a damaged property a period of 2 years within which to reconstruct the same property to the size and density of the original nonconforming use. It says nothing about extension of time or expansion of the 2-year period. Therefore, we will deny the extension of the nonconforming use as requested in the Petition for Special Hearing.

In addition, we would rely on the fact that the Petitioner has not complied with § 500.14 by requesting from the Director of the Department of Environmental Protection & Resource Management the written recommendations required in that section.

ORDER

THEREFORE, IT IS THIS 27th day of January, 2005 by the County Board of Appeals of Baltimore County

ORDERED that the Petition for Special Hearing to extend the two (2) year period permitted under § 104.2 of the *Baltimore County Zoning* Regulations be and is hereby **DENIED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Panel Chair

Margaret Brassil, Ph.D.

John P. Quinn

03-456-SPH

People's Counsel Exhibits

#1 Letter dtd 1-20-05 from PC – attachment:
Memo dtd 1/19/05 from C. Richards w/ attached maps

Recvd 1/21/05

Baltimore County, Maryland
OFFICE OF PEOPLE'S COUNSEL
Room 47, Old CourtHouse
400 Washington Ave.
Towson, MD 21204

410-887-2188
Fax: 410-823-4236

PETER MAX ZIMMERMAN
People's Counsel

CAROLE S. DEMILIO
Deputy People's Counsel

January 20, 2005

Lawrence S. Wescott, Panel Chairman
County Board of Appeals
400 Washington Avenue, Room 49
Towson, Maryland 21204

Re: D.A. Drenner Concrete, Inc
111 Mellor Avenue
Case No.: 03-456-SPH

Dear Mr. Wescott:

Enclosed please find a copy of the January 19, 2005 inter-office memorandum with attached maps from W. Carl Richards, Zoning Supervisor of PDM, concerning the zoning history of this case. Please mark this memorandum as People's Counsel Exhibit 1, per the agreement that this information would be provided after the hearing concluded. It appears to show that the property has been split-zoned commercial and residential at least since 1960.

Thank you for your anticipated consideration.

Sincerely,

Peter Max Zimmerman

Peter Max Zimmerman
People's Counsel for Baltimore County

PMZ/rmw

Enclosures

cc: Michael Tancyzn, Esquire
Benjamin Bronstein, Esquire
W. Carl Richards, Zoning Supervisor (w/o attachments)

RECEIVED
JAN 20 2005
BALTIMORE COUNTY
BOARD OF APPEALS

PC #1

BALTIMORE COUNTY, MARYLAND
Interoffice Memorandum

DATE JANUARY 19, 2005

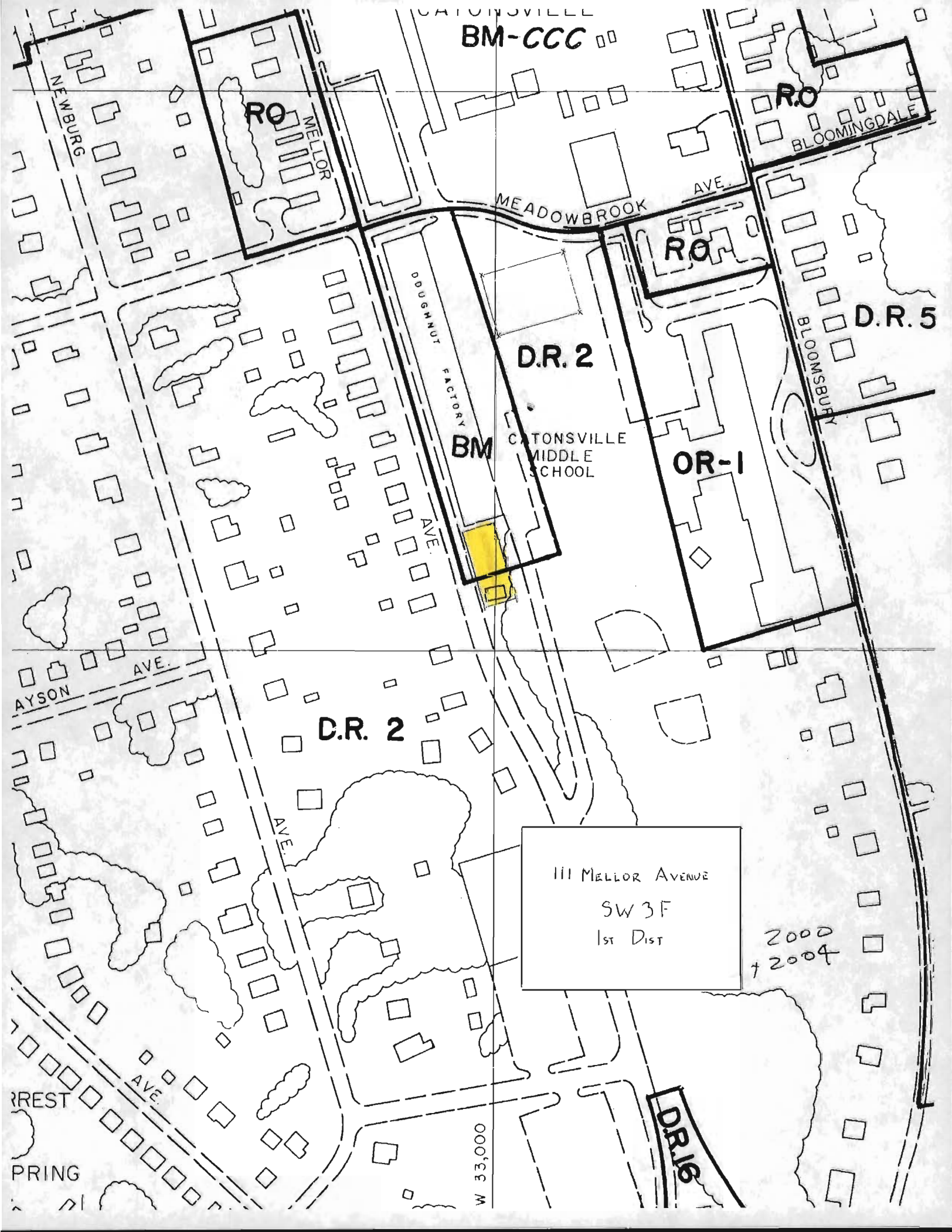
TO: PETER MAX ZIMMERMAN, PEOPLE'S COUNSEL

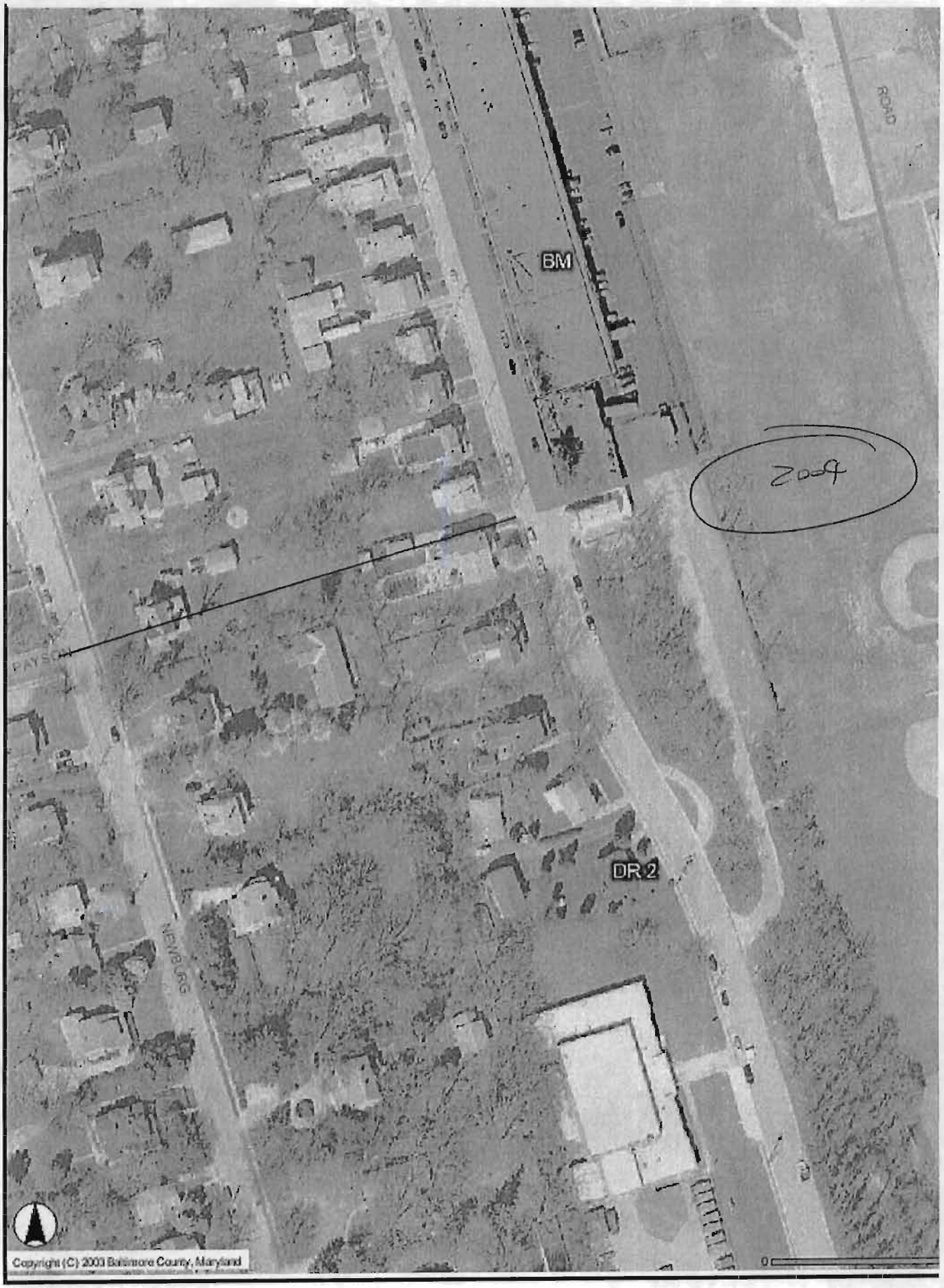
FROM: W. CARL RICHARDS, JR., ZONING SUPERVISOR WCR

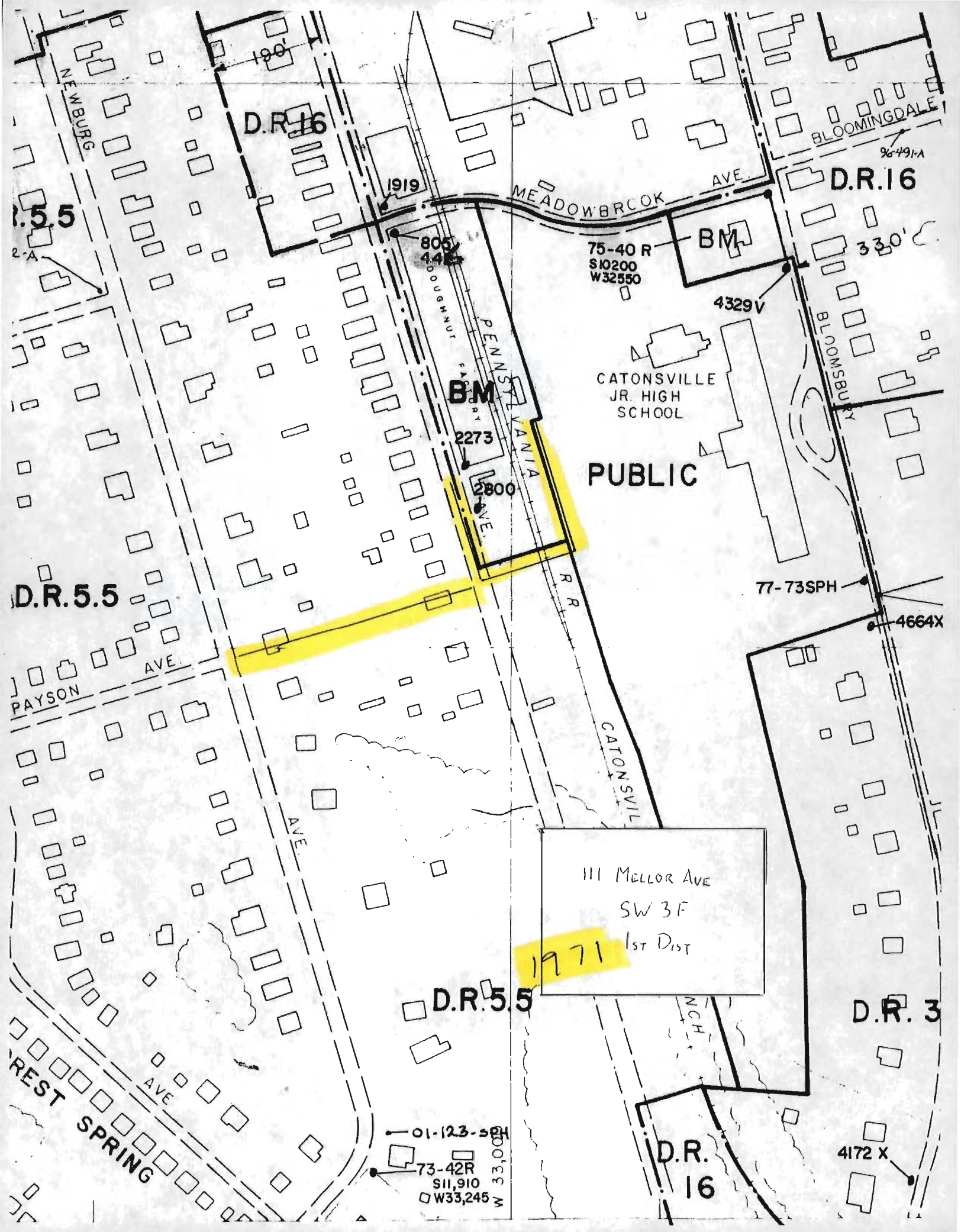
SUBJECT: CASE # 03-456-SPH (D.A. DRENNER CONCRETE, INC., 111 MELLOR AVENUE)

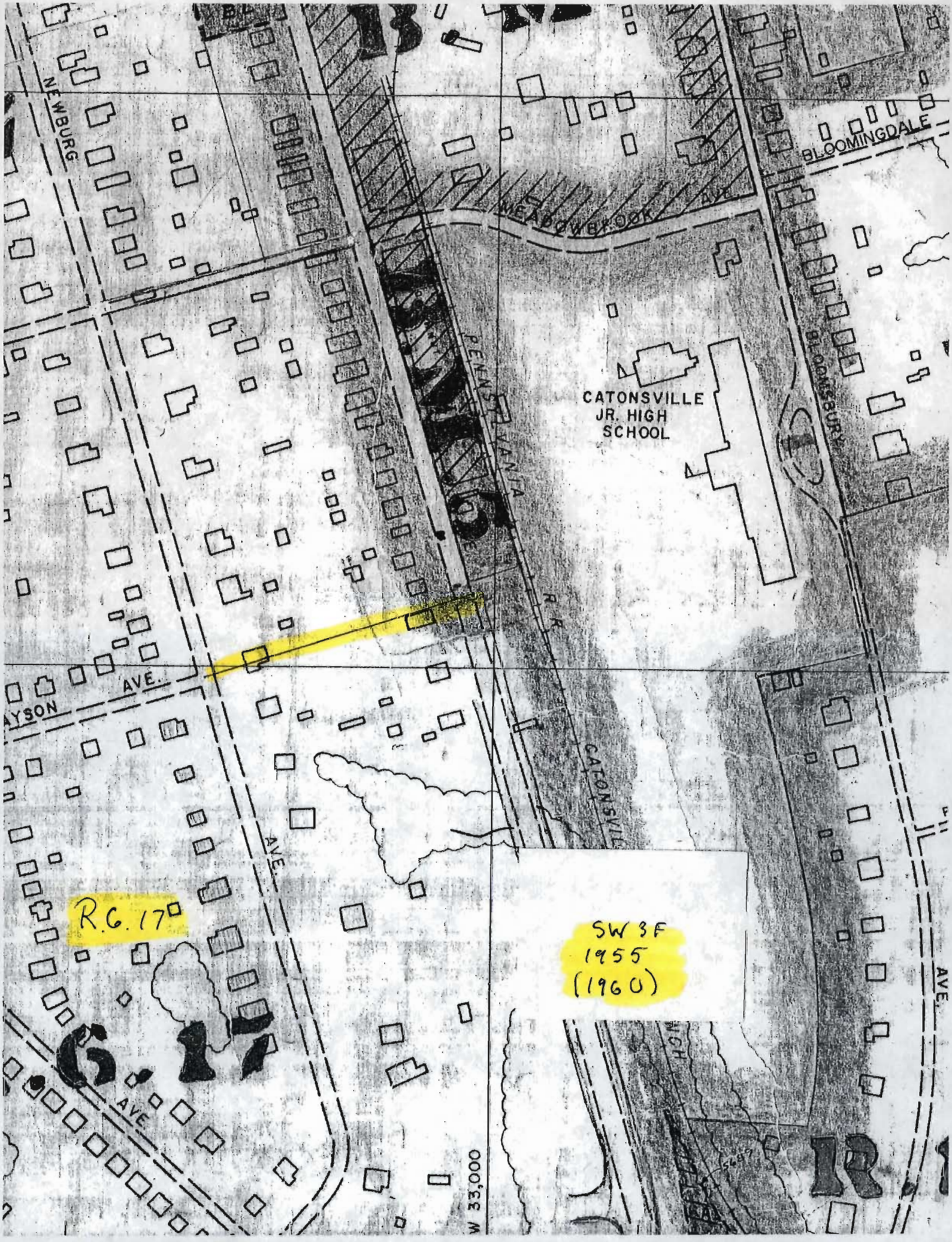
IN RESPONSE TO YOUR 12/27/04 MEMO REGARDING THE ZONING HISTORY OF THE ABOVE LOCATION, PLEASE BE ADVISED THAT THE PROPERTY WAS SHOWN SPLIT-ZONED ON THE 2004,2000,1971, AND 1960 ZONING MAPS. ON THE 1945 ZONING MAP CASE # 2800 IS REFERENCED THIS CASE DENIED INDUSTRIAL ZONING AND GRANTED ON 2/5/54 A-RESIDENCE TO E-COMMERICAL. THIS CASE EXTENDED ABOUT 50 FEET TO 60 FEET SOUTH OF THE CURRENT BM/DR-2 ZONE LINE.

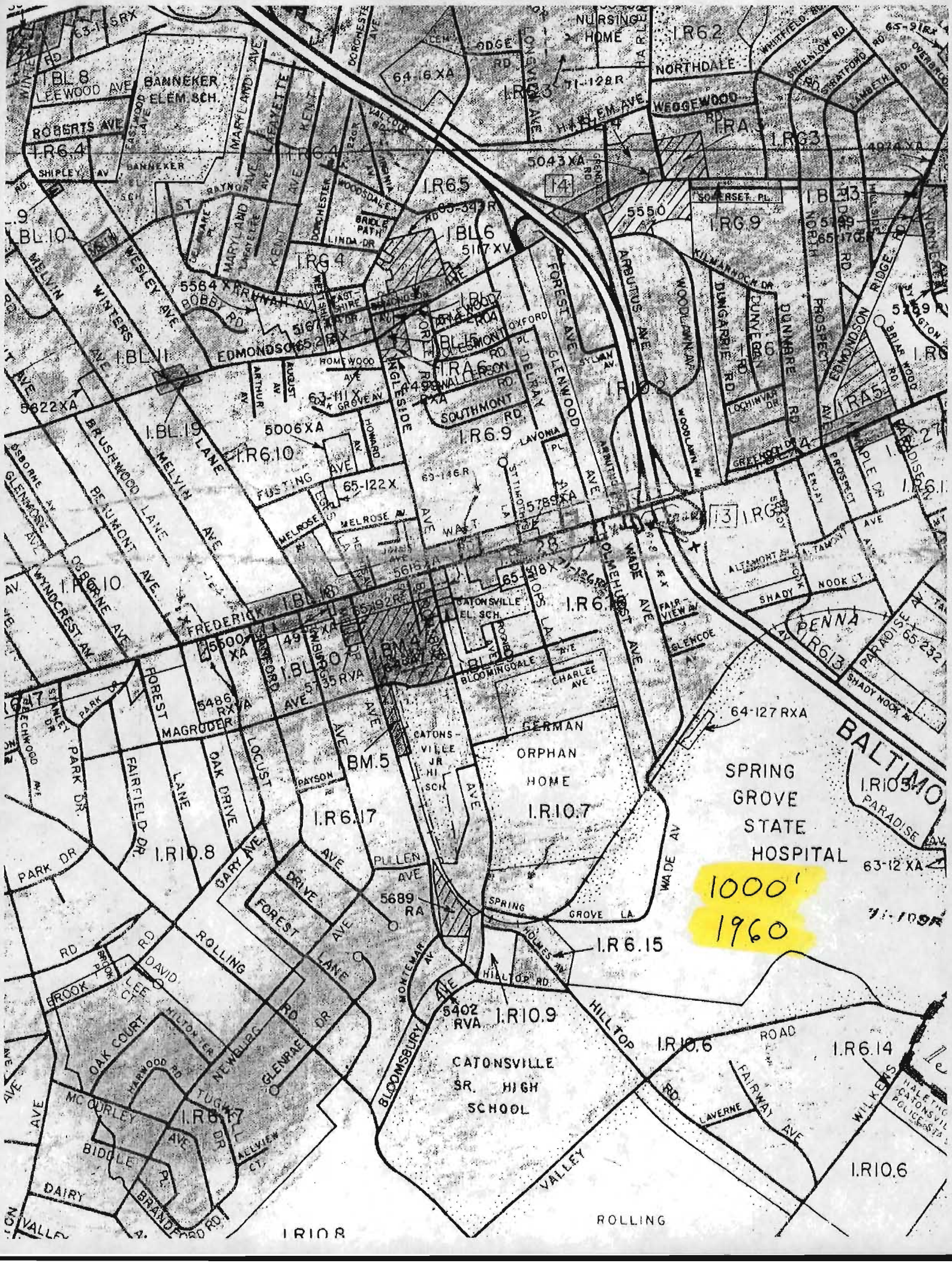
PC #1

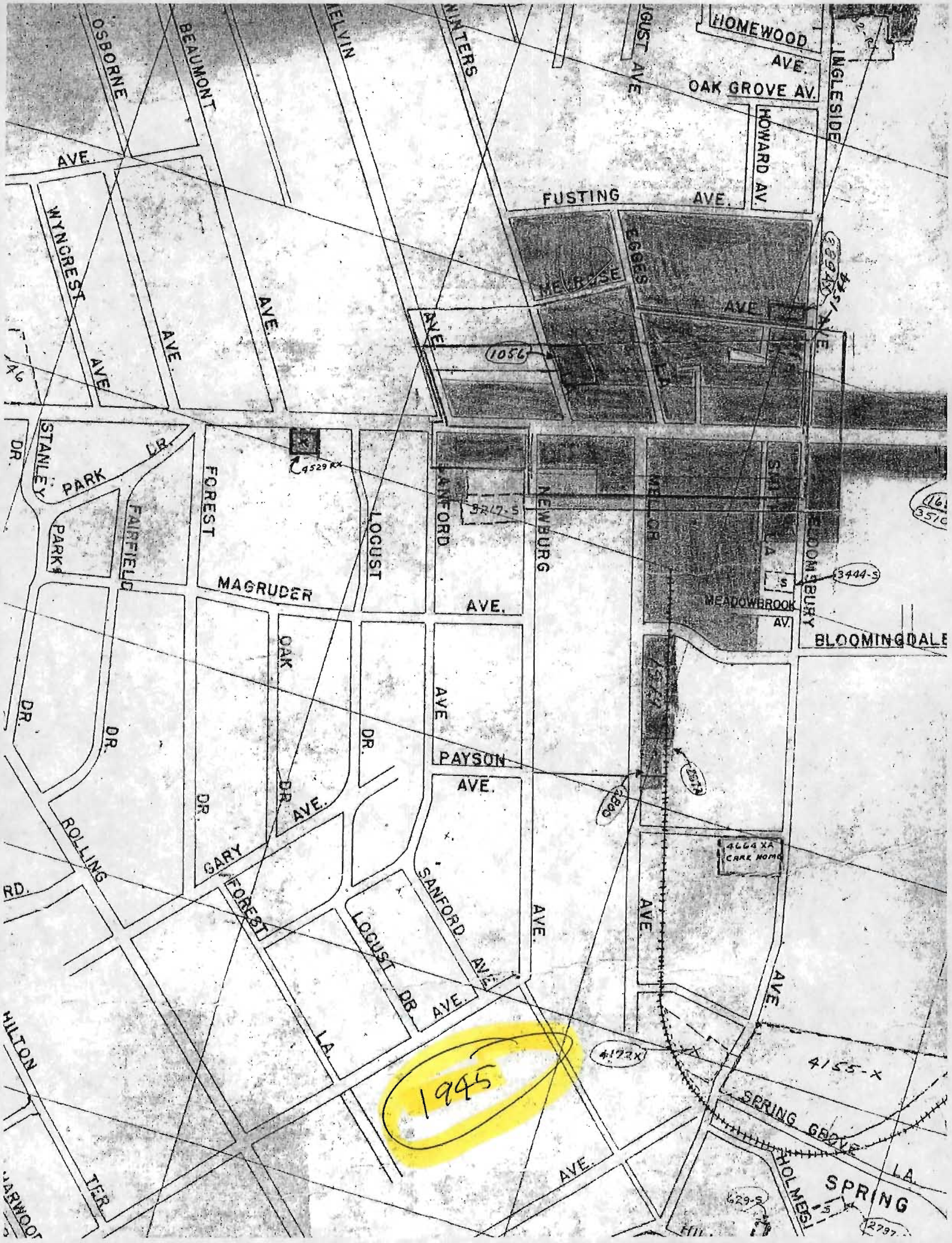

BM-CCC
RO
MELLOR
NEWBURG
R.O
BLOOMINGDALE
MEADOWBROOK
AVE.
RO
DOUGHNUT FACTORY
D.R. 2
D.R. 5
BLOOMSBURY
BM
CATONSVILLE MIDDLE SCHOOL
OR-1
AVE.
AYSON
AVE.
D.R. 2
AVE.
111 MELLOR AVENUE
SW 3F
1ST DIST
2000 + 2004
AVE.
RREST
PRING
W 33,000
D.R.16


BM
DR 2
2004
ROAD
PAYS
NEWBURG
Copyright (C) 2003 Baltimore County, Maryland


D.R.16
NEWBURG
190'
1919
MEADOWBROOK AVE.
BLOOMINGDALE
96491-A
D.R.16
D.R.5.5
805
442
75-40 R
S10200
W32550
BM
330'
4329V
BLOOMSBURY
CATONSVILLE
JR. HIGH
SCHOOL
PENNSYLVANIA
BM
2273
2800
AVE.
PUBLIC
D.R.5.5
77-73SPH
4664X
PAYSON AVE.
R R
CATONSVIL
AVE.
111 MELLOR AVE
SW 3F
1971
1ST DIST
D.R.5.5
D.R. 3
REST SPRING
AVE
01-123-SPH
73-42R
S11,910
W33,245
33,000
D.R.
16
4172 X


NEWBURG
BLOOMINGDALE
MEADOWBROOK
BLOOMSBURY
CATONSVILLE
JR. HIGH
SCHOOL
PENNSYLVANIA
R.R.
CATONSVILLE
AYSON
AVE.
AVE.
AVE.
AVE.
R.C. 17
SW 3F
1955
(1960)
G. 17
W 33,000


SPRING GROVE STATE HOSPITAL
GERMAN ORPHAN HOME
CATONSVILLE SR. HIGH SCHOOL
CATONSVILLE JR. HI SCH
CATONSVILLE EL. SCH
BANNEKER ELEM SCH
NURSING HOME
NORTHDALE
WEDGEWOOD
EDMONDSON
FREDERICK
MAGRUDER
BALTIMO
PENNA
1000'
1960


OSBORNE
BEAUMONT
MELVIN
WINTERS
AUGUST AVE
HOMEWOOD AVE.
OAK GROVE AV.
INGLESIDE
HOWARD AV.
FUSTING AVE.
EGGES
MELROSE
WYNCREST
AVE.
STANLEY
PARK
LR.
DR.
FAIRFIELD
FOREST
LOCUST
SANFORD
NEWBURG
MELROSE
BLOOMINGDALE
MEADOWBROOK AV.
MAGRUDER
OAK
PAYSON
ROLLING
GARY
SANFORD AVE.
LA.
HILTON
TER
SPRING GROVE
HOLMES
SPRING
1945

#2800 ✓
map
41-A
E

RE: PETITION FOR RECLASSIFICATION FROM AN "A" RESIDENCE ZONE TO AN "M" INDUSTRIAL ZONE - E. S. Yellow Ave., 1,557 feet S. Frederick Road, 1st Dist., Franklin Realty & Finance Co., Inc., Petitioner

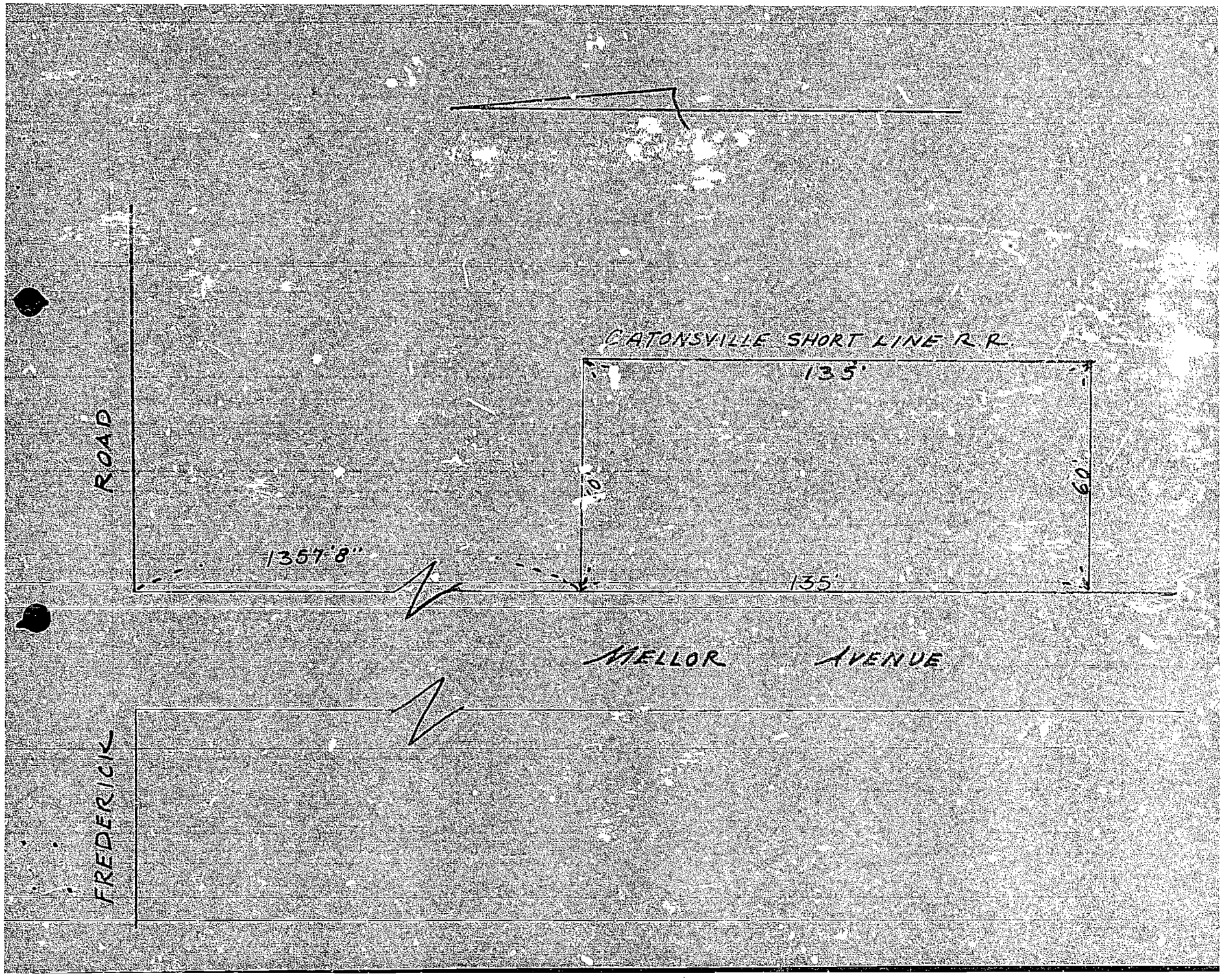
Pursuant to the advertisement, posting of property and public hearing on the above petition and it appearing that by reason of location, reclassification for light industrial use would be "spot zoning".

Therefore it is ORDERED by the Zoning Commissioner of Baltimore County this 13th day of January, 1954, that the above petition be and the same is hereby denied for reclassification of the property from an "A" Residence Zone to an "M" Light Industrial Zone. However, in accordance with the power and authority in me vested as Zoning Commissioner of Baltimore County, I hereby reclassify the property, described in the within petition, from an "A" Residence Zone to an "B" Commercial Zone, said reclassification being an extension of an existing commercial zone.

Zoning Commissioner
of Baltimore County

APPROVED:
COUNTY COMMISSIONERS
OF BALTIMORE COUNTY

Date FEB 5 1954


CATONSVILLE SHORT LINE R.R.
135'
60'
70'
135'
1357'8"
ROAD
MELLOR AVENUE
FREDERICK

03-456-SPH
Drennen

Verified 12/22/04

Petitioners Exhibits

Pet 1 ✓ Zoning Map

Pet 2 ✓ A-B Photos from hearing below

Pet 3 ✓ A-D Photos

Pet 4 ✓ A-P Photos

Pet 5 ✓ A-F Photos

Pet 6A-B ✓ Photos

Pet 7A-C ✓ Photos

Pet 8 ✓ Pet for Reclass in 1954

Pet 9 ✓ Lease between Balt City & 1990

Pet 10 ✓ Lease

Pet 11 ✓ Deed selling property to Drennen March 2000

Pet 12 ✓ ID only Denied — Deed of Armory prop

Pet 13 ✓ A-C Photos

Petitioners Exhibits

Pet 14 Photo

Pet 15 Transmittal letter from Mcxaly's office

Pet 16 Ad.

Pet 17 Photo Series April 2004

Pet 18 Photo

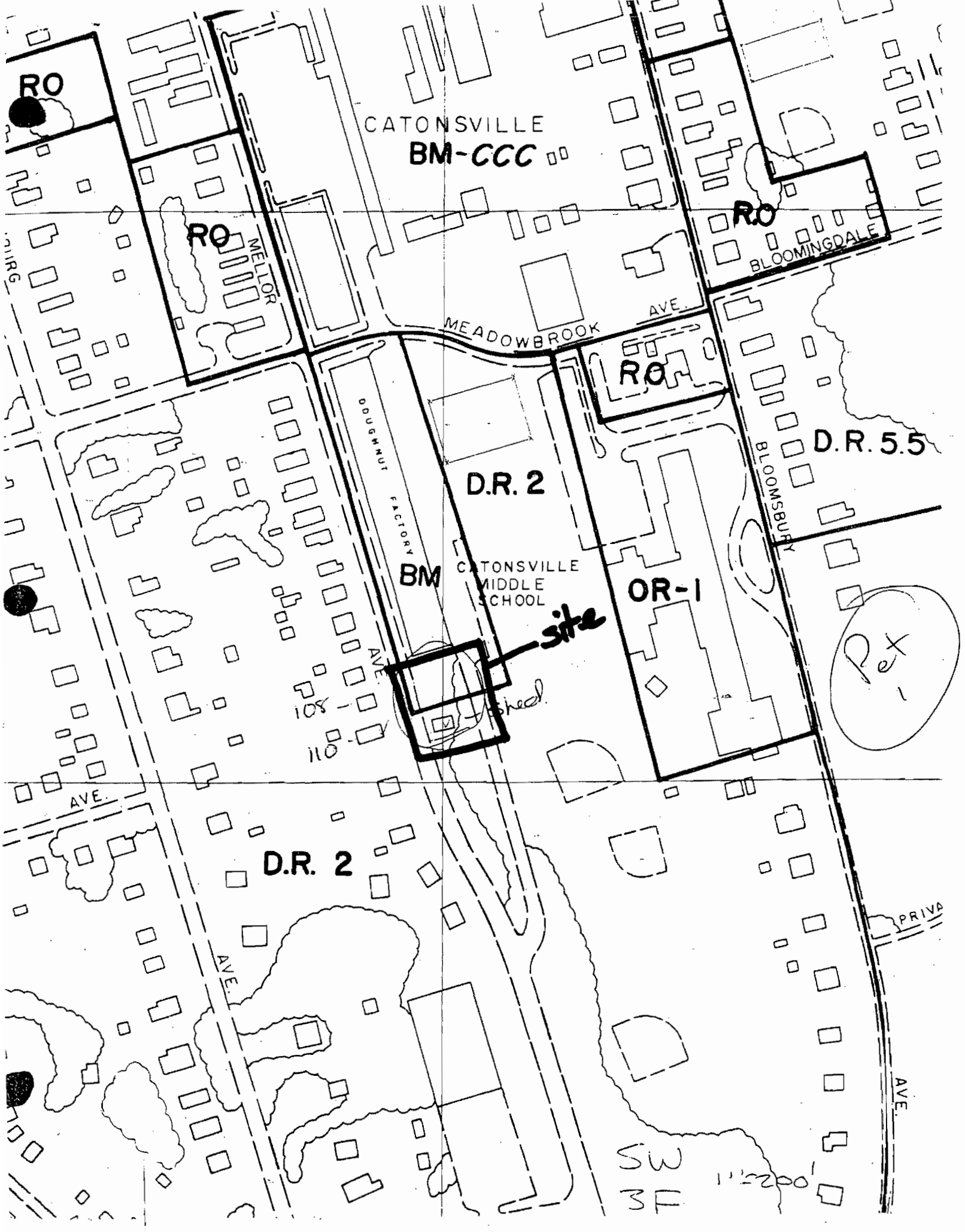
Pet 19 December 15 2004 Photo with Dumpster

Pet 20 Dec 15 2004 Photo Rest of Yard

Pet 21 Dec 15 2004 Photo - Fence

Pet 22 Photo

Pet 23 Real


RO
CATONSVILLE
BM-CCC
RO
MELLOR
RO
BLOOMINGDALE
MEADOWBROOK
AVE.
RO
D.R. 5.5
BLOOMSBURY
DOUGHNUT FACTORY
D.R. 2
BM
CATONSVILLE MIDDLE SCHOOL
OR-1
site
Ret 1
108
110
AVE.
D.R. 2
AVE.
AVE.
PRIVA
SW
3F
1"=200'

JUN • 69

69

Kathy

Pat

Bd 18

(#03-456-SPH)

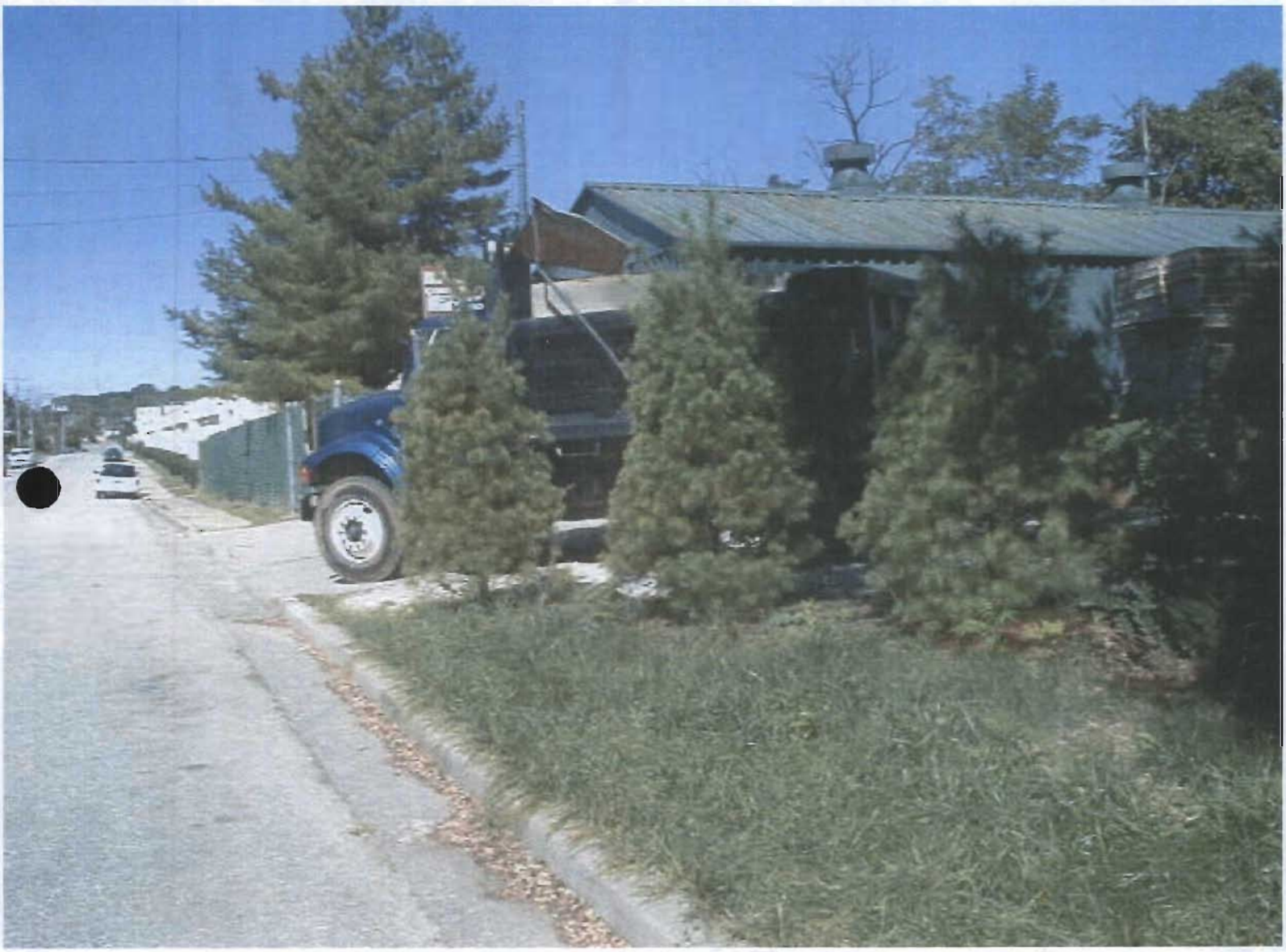
Bd 29

Pat 3d 9A

Pat 3st
9B
Bd 2B

Fall 1999

Pat
11A Bd 3A

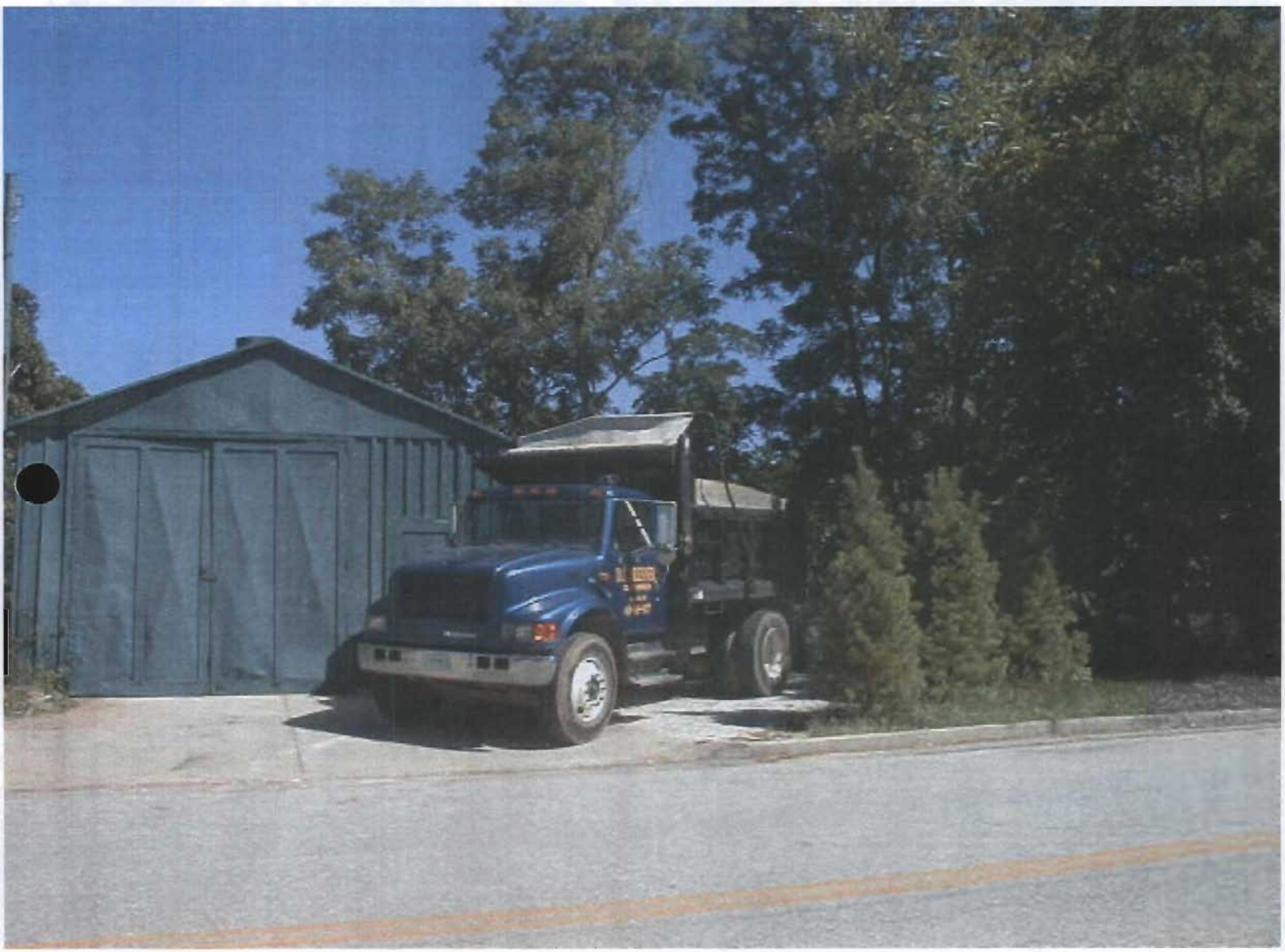


Pet
11B

CBA
3B

Pat
11C

CBA
3C



Pet
110 Bd 30

Petition for Zoning Re-Classification

To the Zoning Commissioner of Baltimore County:

FRANKLIN REALTY & FINANCE CO., INC. legal owner of the property situate under contract

All that parcel of land in the First District of Baltimore County, the east side of Mellor Avenue 1357 feet 8 inches southerly from Frederick Road, thence binding east side of Mellor Avenue 135 feet, thence easterly, at right angles to Mellor Avenue, 60 feet more or less, to intersect the west side of the railroad right-of-way, thence binding on the west side of said right-of-way northerly 135 feet and thence south 78 degrees 57 minutes west feet, more or less, to beginning. Being property of Franklin Realty & Finance Co., Inc., as shown on plat plan filed with the Zoning Department.

easterly at right angles to said Mellor Ave., 60 feet more or less to intersect the west side of the railroad right of way, thence binding on the west side of said right of way, northerly 135 feet and thence south 78 degrees fifty seven minutes west 60 feet more or less to the place of beginning.

hereby petition that the zoning status of the above described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an R.E.S. zone to an F. Light Industrial zone.

Reasons for Re-Classification:

Size and height of building: front _____ feet; depth _____ feet; height _____ feet.

Front and side set backs of building from street lines: front _____ feet; side _____ feet.

Property to be posted as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above re-classification, advertising, posting, etc., upon filing of this petition, and further agree to, and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

FRANKLIN REALTY & FINANCE CO., INC.

By: David W. Gbertkof, President

Legal Owner

Address 207 N. Franklin St., Baltimore 1, Md.

ORDERED By The Zoning Commissioner of Baltimore County, this 9th day of November, 1953, that the subject matter of this petition be advertised, as required by the "Zoning Law of Baltimore County," in a newspaper of general circulation throughout Baltimore County, that property be posted, and that the public hearing hereon be had in the office of the Zoning Commissioner of Baltimore County, in the Reckord Bldg., in Towson, Baltimore County, on the 30th day of November, 1953, at 10:30 o'clock A.M.

Zoning Commissioner of Baltimore County

(over)

BDG

Pet No 1

Ret No 2

Bd 9

RPH/cbz

LEASE AGREEMENT

THIS LEASE AGREEMENT, made this 24th day of Oct. ,1990 by and between the MAYOR AND CITY COUNCIL OF BALTIMORE, a municipal corporation of the State of Maryland, hereinafter called LESSOR and NICODEMUS CONSTRUCTION CO., INC., a corporation of the State of Maryland, hereinafter called LESSEE.

1. The Lessor in consideration of good and valuable considerations and the performance of other conditions herein set forth, hereby grants to the Lessee the use of:

2. **DESCRIPTION OF PROPERTY:**

Property located on the east side of Mellor Avenue, Baltimore County, Maryland and known as 111 Mellor Avenue, consisting of a fenced in lot approximately 180'x60' and a metal garage building.

3. **USE:**

Use is for a carpentry shop and storage of materials.

4. **TERM:**

A. The term of this Lease Agreement shall be month to month, beginning November 1, 1990.

B. Notwithstanding anything to the contrary contained herein, it is agreed between the parties, that Lessor and Lessee may cancel and immediately terminate this Lease for any reason whatsoever, by the giving of 30 days written notice to the other.

5. **WORK AND SERVICES BY LESSEE:**

A. Lessee accepts the property "As Is" and will maintain the land in reasonable condition.

B. Lessee shall not use or allow the demised area or any part thereof to be used for any illegal, unlawful, or improper purpose, or for any activity which will constitute a nuisance to adjacent properties, or the adjacent neighborhood.

C. Lessee hereby grants Lessor the right to enter upon said premises for the inspection, repair or reconstruction of underground or surface utilities. Lessor will return the land to its original state should excavation be necessary.

Bd No 3

Bd 70

RPH/cbz/#8

LEASE AGREEMENT

THIS LEASE AGREEMENT, made this 2nd day of August 1993 by and between the MAYOR AND CITY COUNCIL OF BALTIMORE, a municipal corporation of the State of Maryland, hereinafter called LESSOR and DARREL A. DRENNER, hereinafter called LESSEE.

1. The Lessor in consideration of good and valuable considerations and the performance of other conditions herein set forth, hereby grants to the Lessee the use of:

2. DESCRIPTION OF PROPERTY:

Property located on the east side of Mellor Avenue, Baltimore County, Maryland and known as 111 Mellor Avenue, consisting of a fenced in lot approximately 180'x60' and a metal garage building.

3. USE:

Use is for an office and storage of materials.

4. TERM:

A. The term of this Lease Agreement shall be month to month, beginning August 1, 1993.

B. Notwithstanding anything to the contrary contained herein, it is agreed between the parties, that Lessor and Lessee may cancel and immediately terminate this Lease for any reason whatsoever, by the giving of 30 days written notice to the other.

5. WORK AND SERVICES BY LESSEE:

A. Lessee accepts the property "As Is" and will maintain the land in reasonable condition.

B. Lessee shall not use or allow the demised area or any part thereof to be used for any illegal, unlawful, or improper purpose, or for any activity which will constitute a nuisance to adjacent properties, or the adjacent neighborhood.

C. Lessee hereby grants Lessor the right to enter upon said premises for the inspection, repair or reconstruction of underground or surface utilities. Lessor will return the land to its original state should excavation be necessary.

00114361 556

Lot No 4

Bd 11

SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED is made this 10th day of March, 2000, by **MAYOR AND CITY COUNCIL OF BALTIMORE**, a Municipal Corporation of the State of Maryland, as Grantor, and **D.A. DRENNER CONCRETE, INC.**, a Maryland Corporation, as Grantee.

WITNESSETH:

WHEREAS, the Mayor and City Council of Baltimore in pursuance of the power and authority contained in the provisions of Article V, Section 5(b) of the Baltimore City Charter (1996 Edition) and in pursuance of Ordinance No. 98-381, approved December 21, 1998, has sold the property hereinafter described to the said Grantee; and

WHEREAS, the City Comptroller, acting under the said authority, has sold at private sale unto the Grantee, the said property at and for the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) approved by the Board of Estimates on July 14, 1999 and so entered upon its minutes.

THAT, for and in consideration of the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) and for other good and valuable consideration, receipt of which is acknowledged, Grantor grants and conveys to Grantee, its successors and assigns, in fee simple all rights, title and interest in and to the real property situate and lying in Baltimore County, Maryland described in Exhibit "A" attached hereto and made a part hereof (herein called "Premises").

TOGETHER WITH, all of the improvements thereon and all of the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging or in any way appertaining.

TO HAVE AND TO HOLD, the Premises unto and to the proper use and benefit of Grantee, its successors and assigns, in fee simple, forever.

THE GRANTOR HEREBY COVENANTS, to warrant specially title to that part of the Premises described on Exhibit "A" against all persons lawfully claiming the same by, through or under Grantor, and agrees to execute such further assurances of such Premises as may be requisite.

The Grantee accepts the Premises "as is" in its present condition. There are no understandings, agreements or warranties as to any alterations, additions or remediation to be now or hereafter made by the Grantee.

parcel 1983

REVIEWED SDAT
JZ 3-13-00
BY DATE

CEL. PER TICKET AUG 12 1954

THIS DEED, Made this 19th day of May ,1954, by and between the MAYOR AND CITY COUNCIL OF BALTIMORE, a municipal corporation, of the State of Maryland, party of the first part and the STATE OF MARYLAND, to the use of the MILITARY DEPARTMENT, party of the second part.

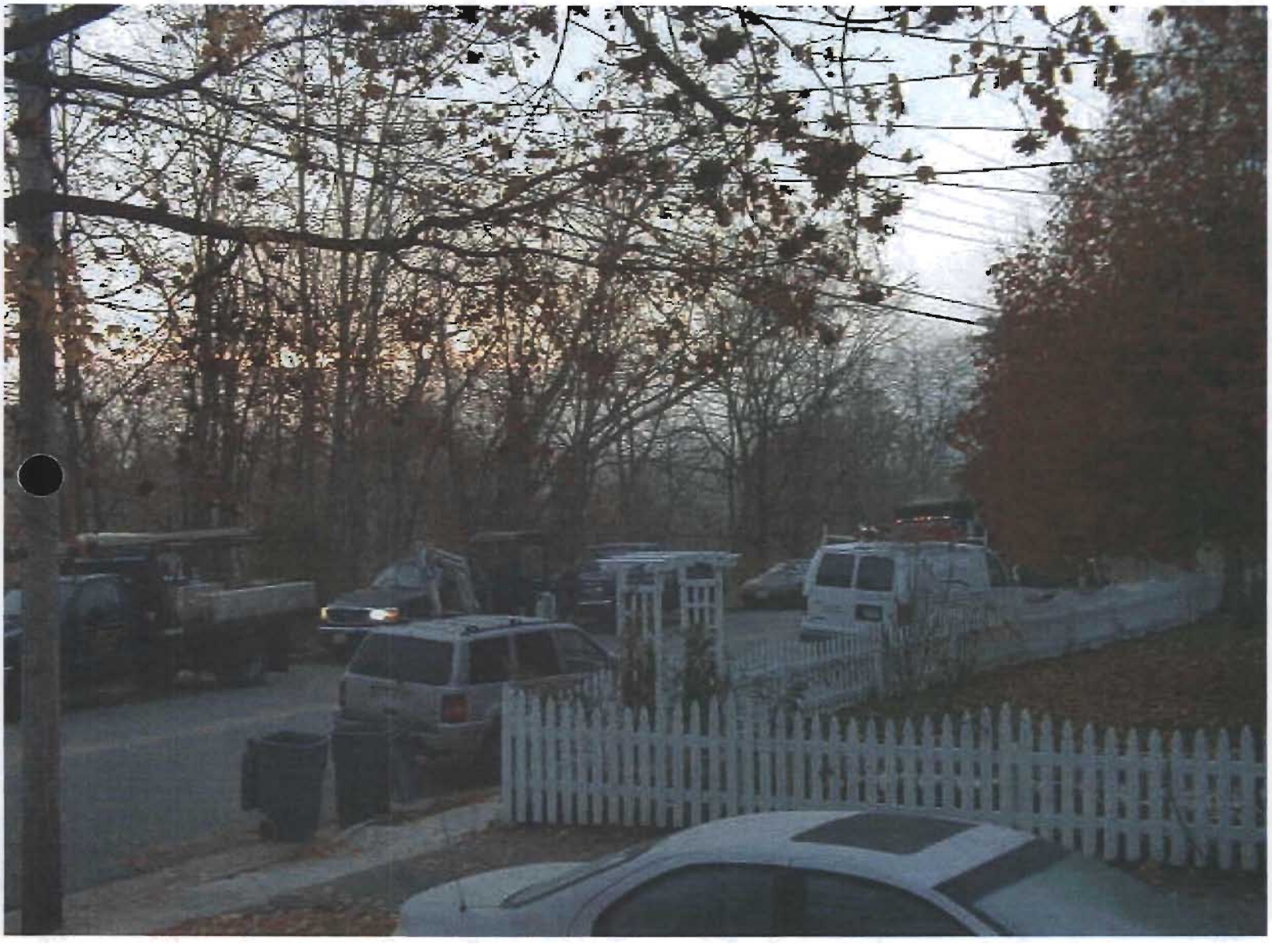
WHEREAS by Ordnance of the Mayor and City Council of Baltimore, No. 987, approved April 1,1954, the City Comptroller was authorized and directed to sell either at public or private sale, in accordance with Section 169 of the City Charter, the lot of ground hereinafter described, said property being no longer needed for public use; and

WHEREAS the City Comptroller has sold unto the said party of the second part the lot of ground hereinafter described, which sale was approved by the Board of Estimates on the 19th day of May ,1954, and duly entered upon its minutes.

NOW, THEREFORE, THIS DEED WITNESSETH, That in consideration of the sum of Five Dollars ($5.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the said party of the first part does hereby grant and convey unto the said party of the second part, its successors and assigns, in fee simple, all that lot of ground situate in Baltimore County, State of Maryland, and more particularly described as follows, that is to say:

> BEGINNING for the same at a point on the east side of Mellor Avenue, 291.0 feet south from the southwest corner of the parcel of land described in a lease from Henrietta R. Glenn et al, Trustee, to the Catonsville Short Line Railroad Company by deed dated November 8,1884 and recorded among the Land Records of Baltimore County in Liber W.M.I. No. 143, folio 1, said point being 1492 feet 8 inches southerly from the southeast corner of Mellor Avenue and the Frederick Turnpike and running thence binding on the east side of said Mellor Avenue South 11 degrees 03 minutes 00 seconds East 220.0 feet more or less to the north side of a 32 foot road, as laid out on a plat in the Circuit Court of Baltimore County, exhibit 14 in the case of Lucy G. Ranson et al for James G. Harwood et al Docket 14, folio 177, extending from said Mellor Avenue easterly to the right of way of said Catonsville Short Line Railroad and intended to connect with a similar road 32 feet wide as laid out on said plat, extending from said right of way to Bloomsbury Avenue, both of said roads

Ex 1105 ID only BA 18 M

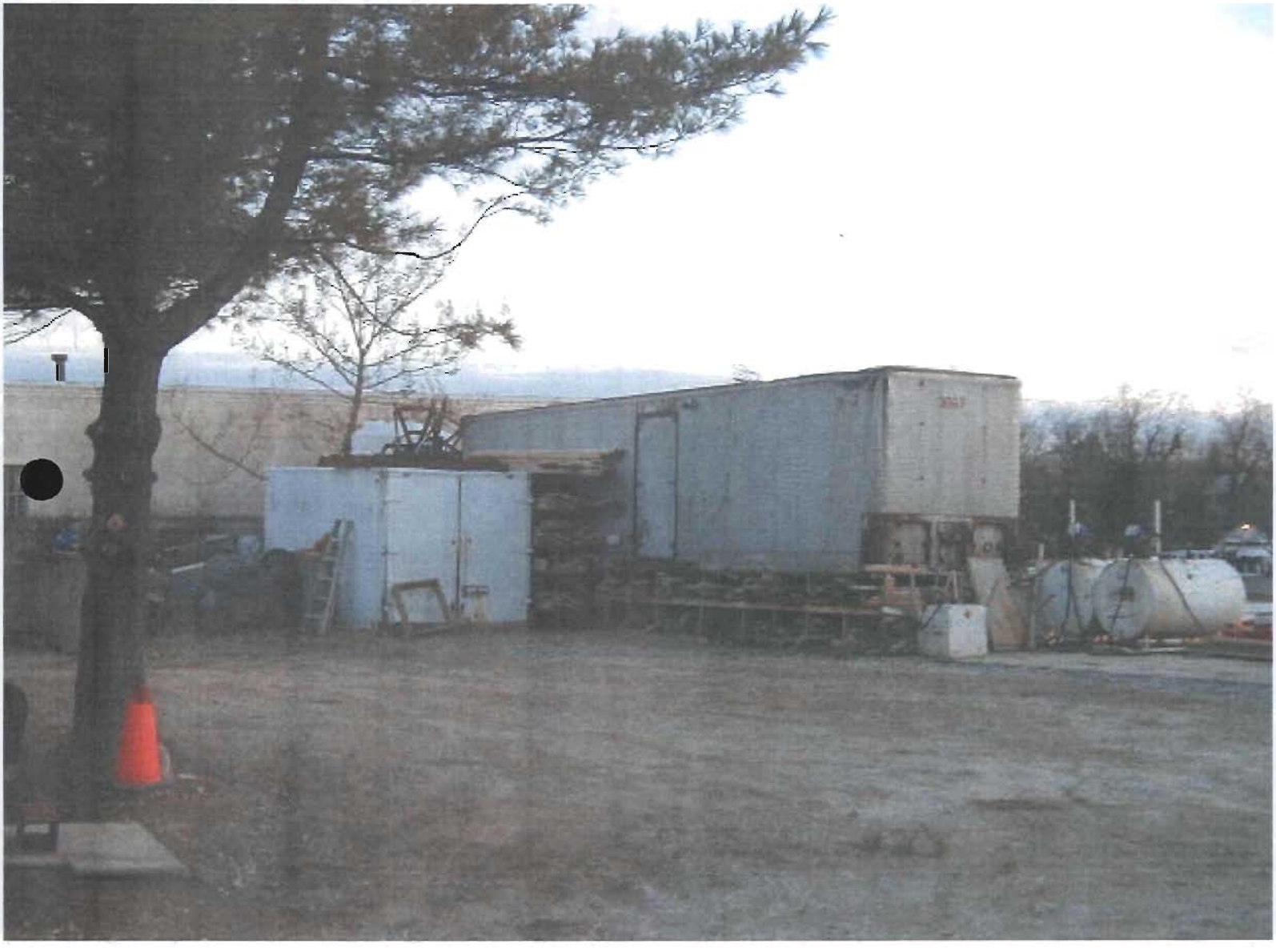


Fall 2001

12A Bel 4A

12B

12C



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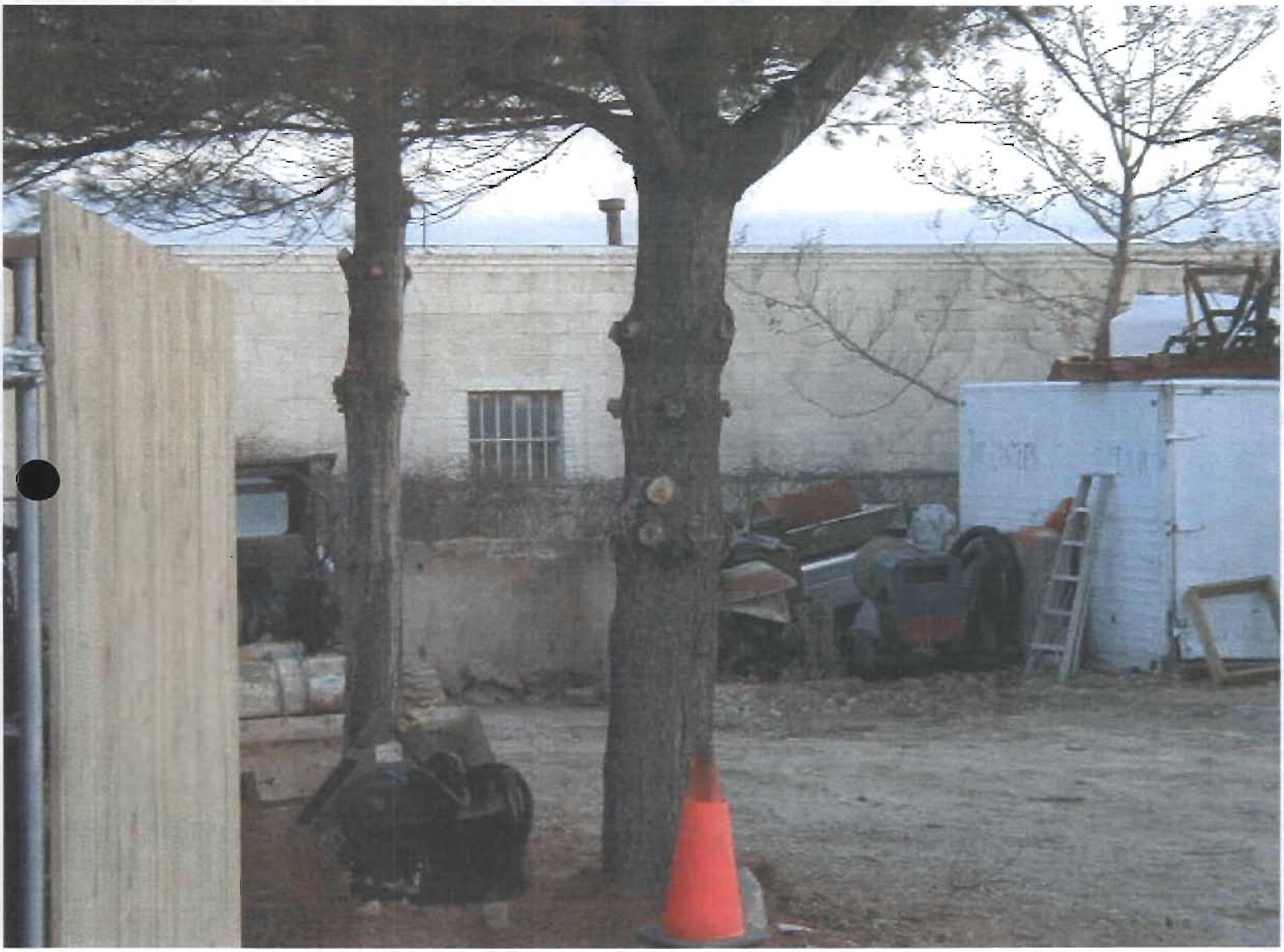

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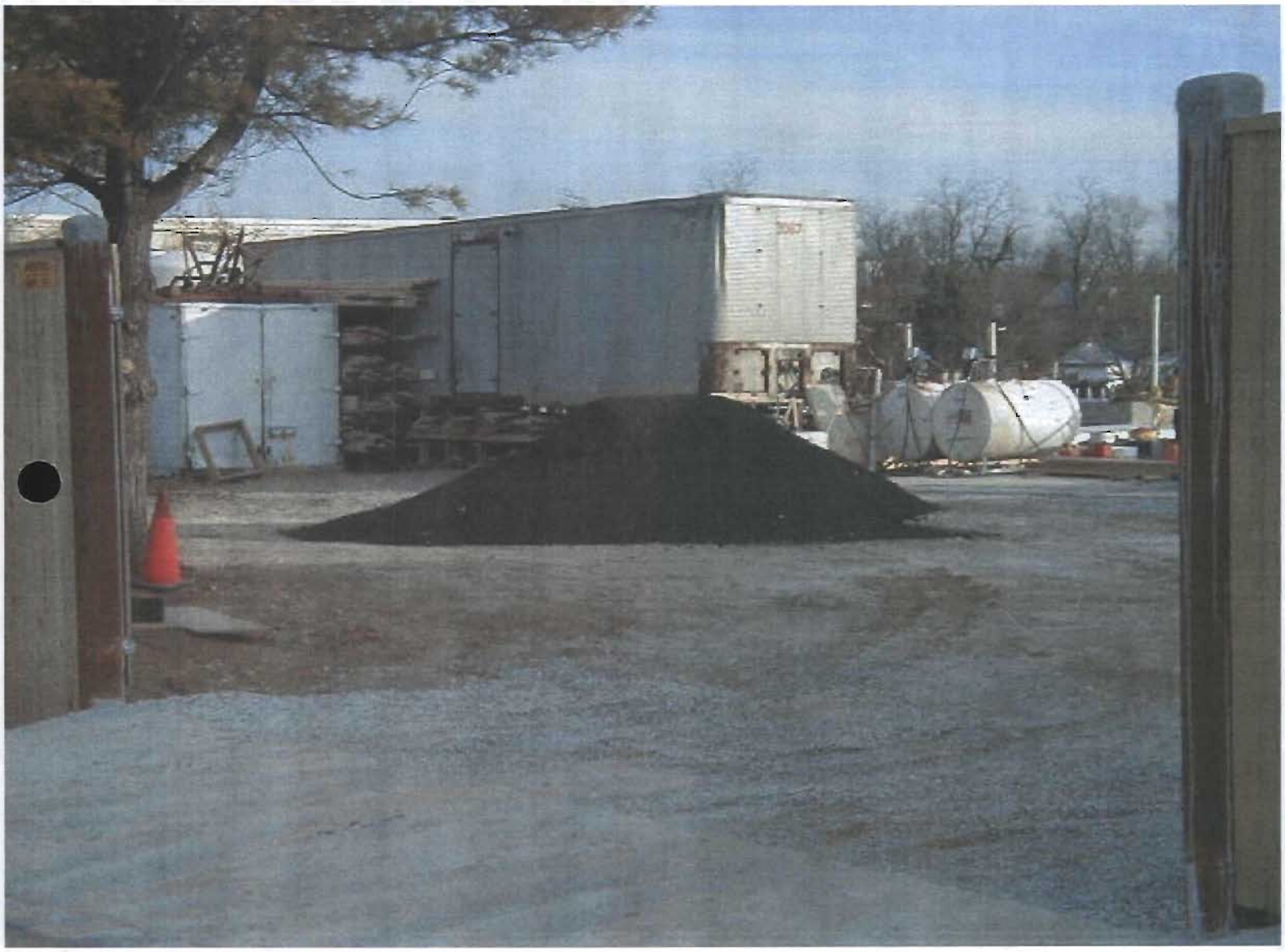

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12A

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12K

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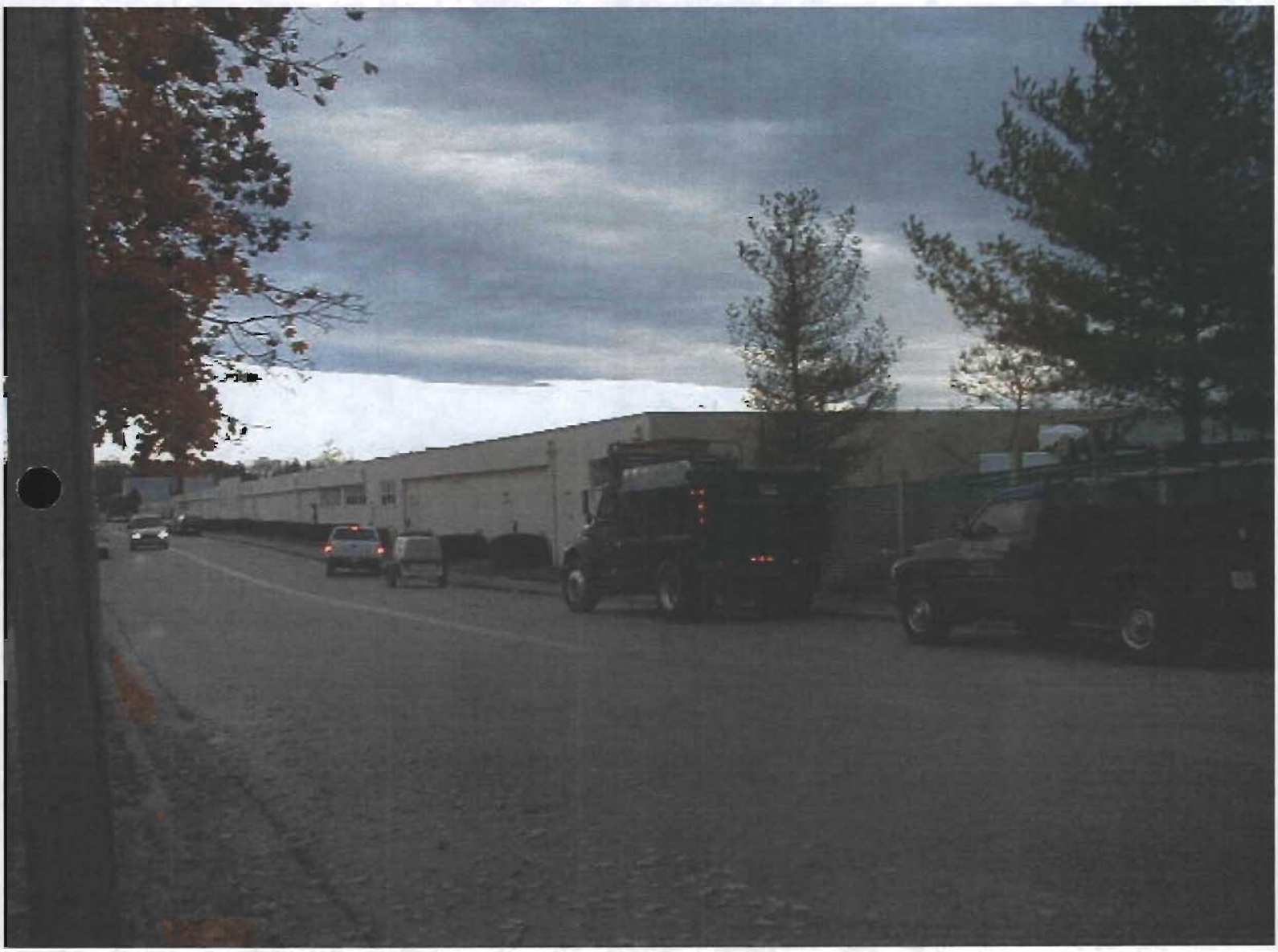

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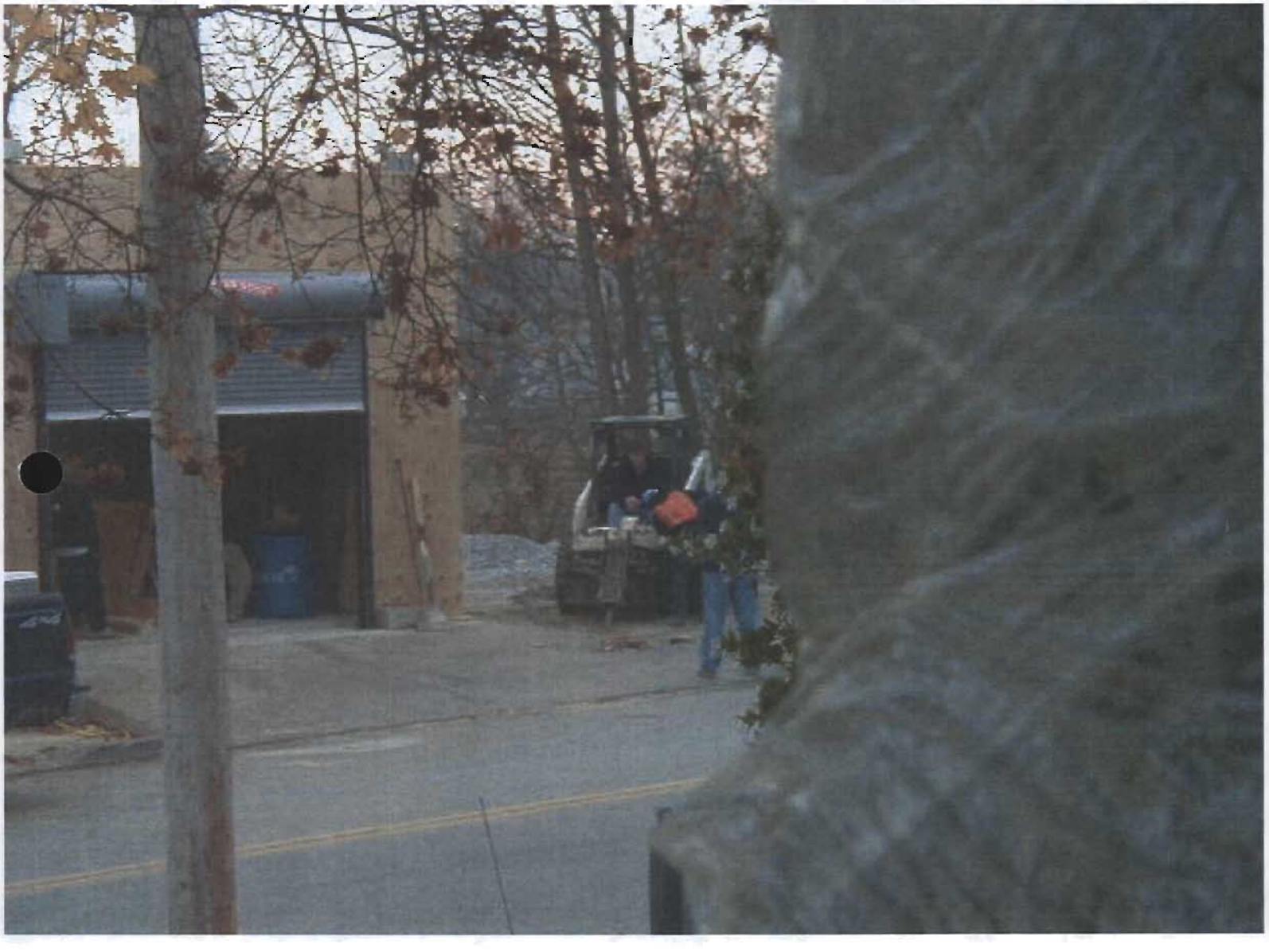

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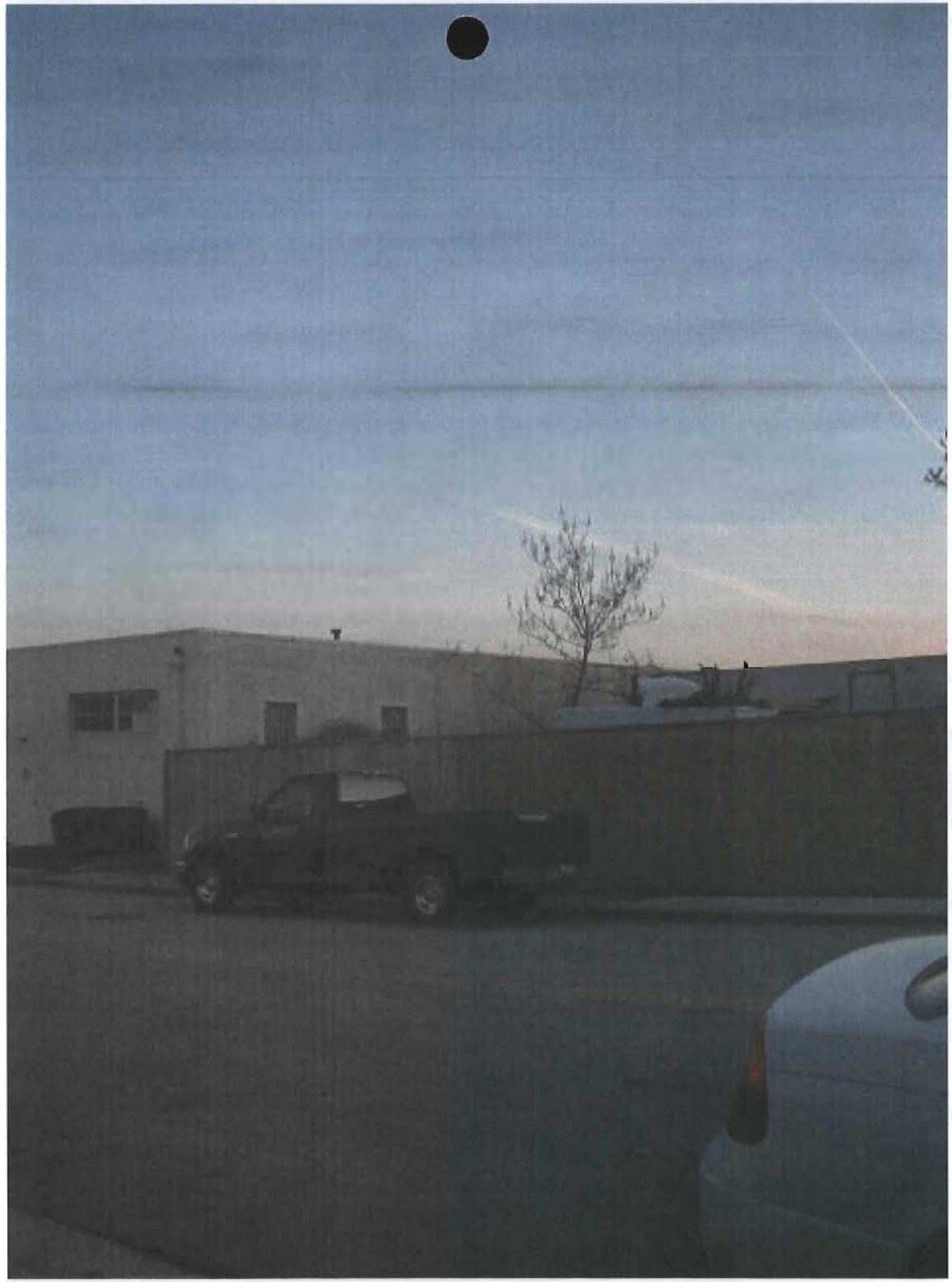
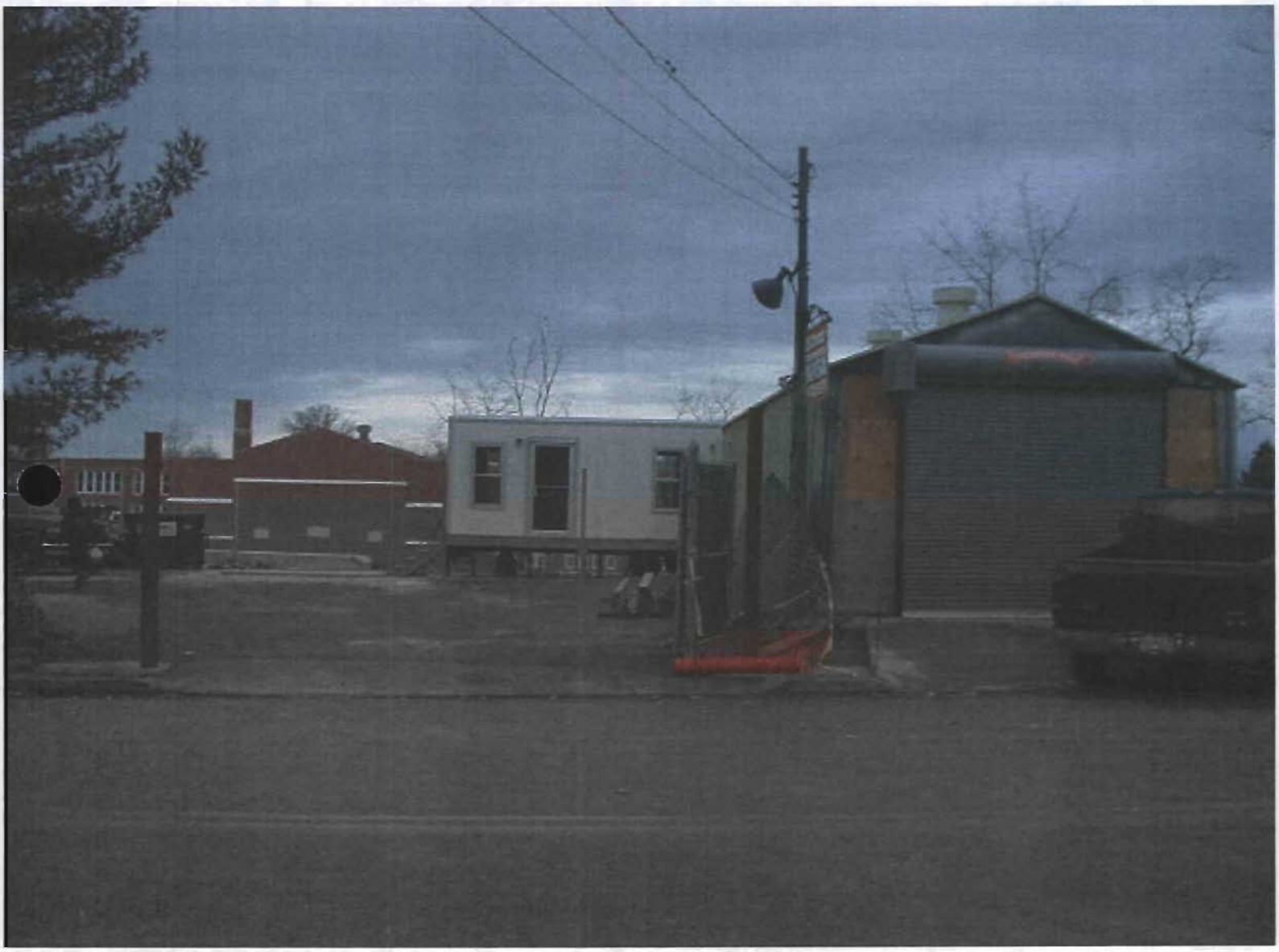


13A Bd 5A



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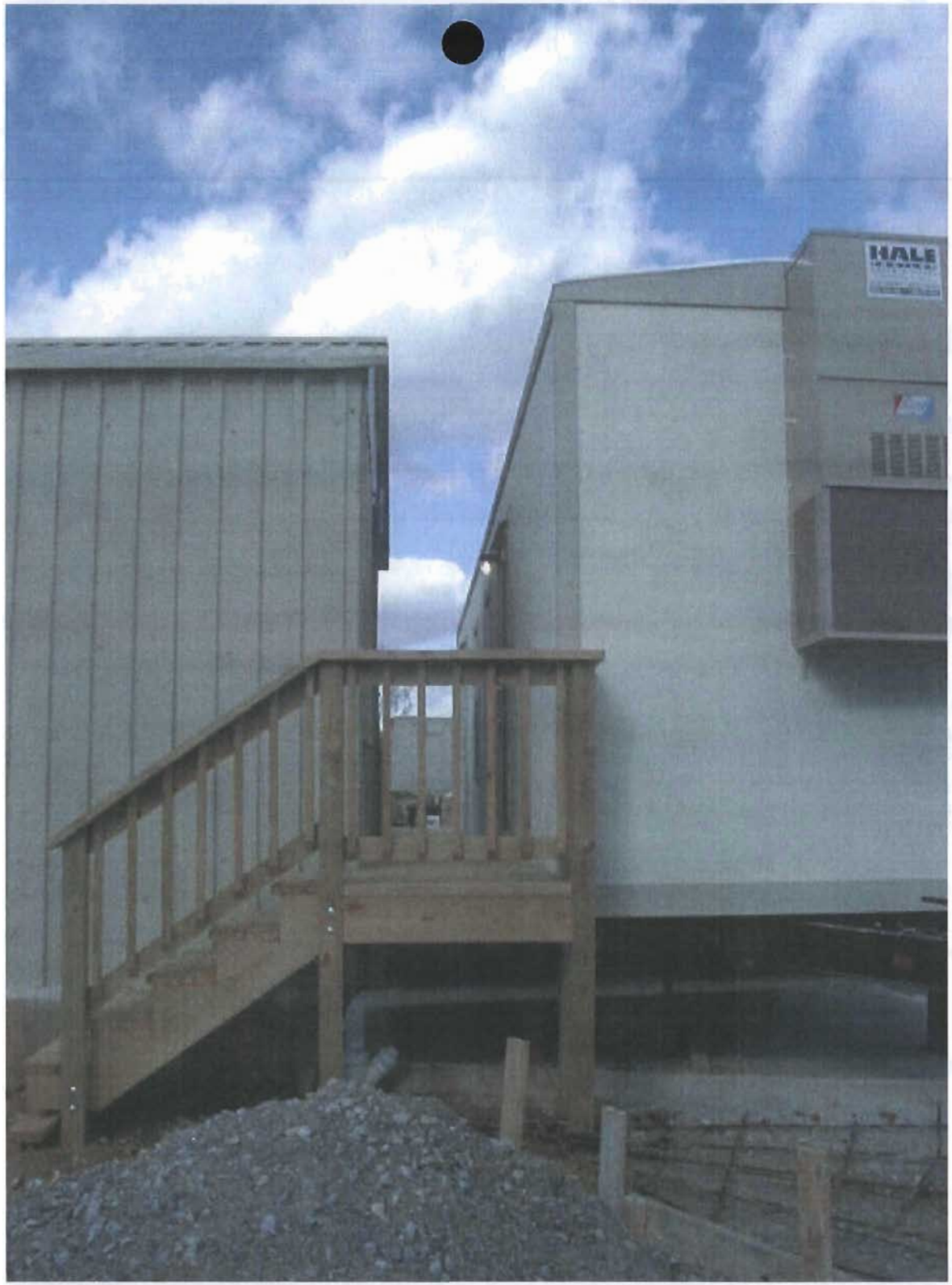

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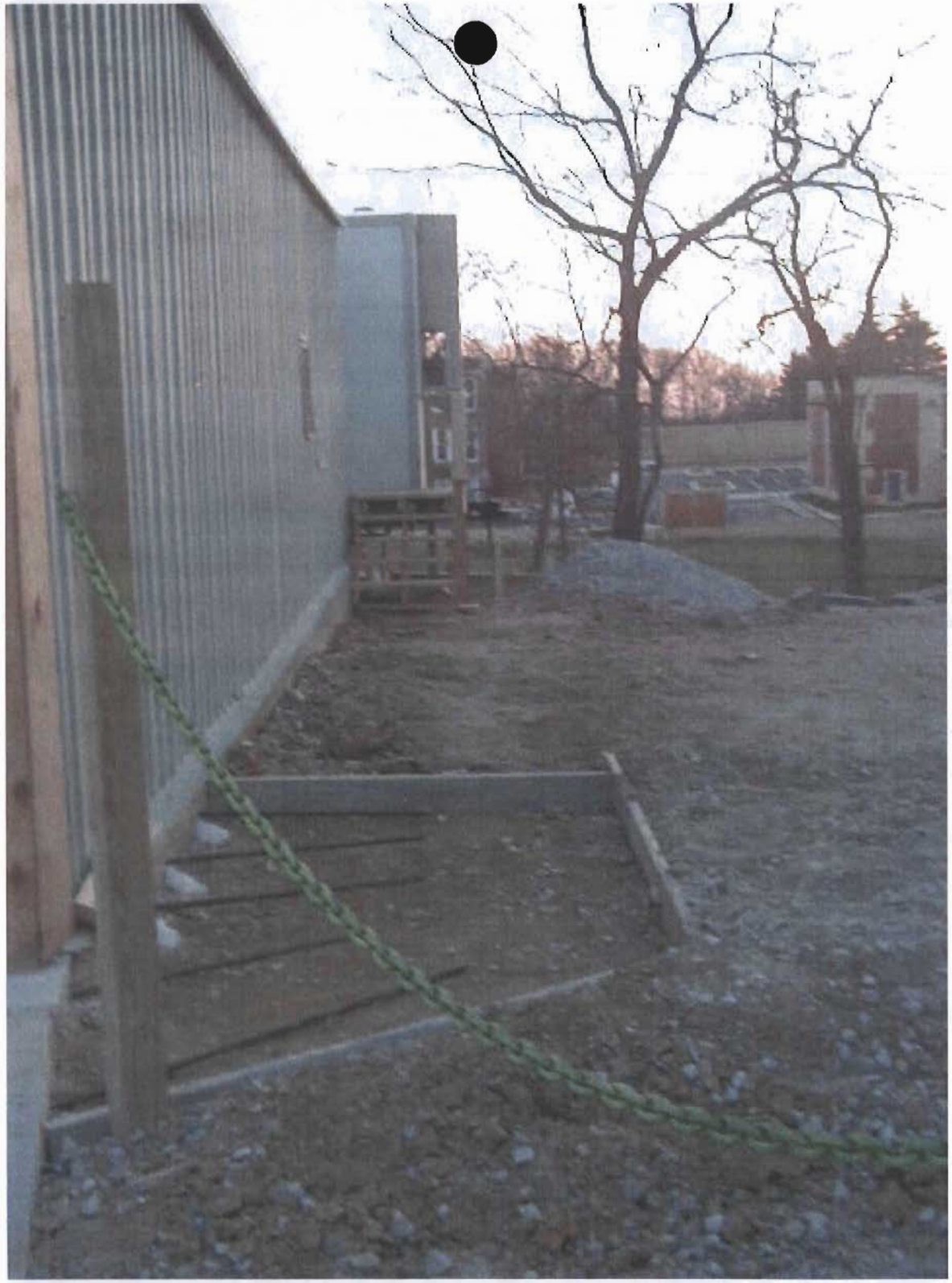
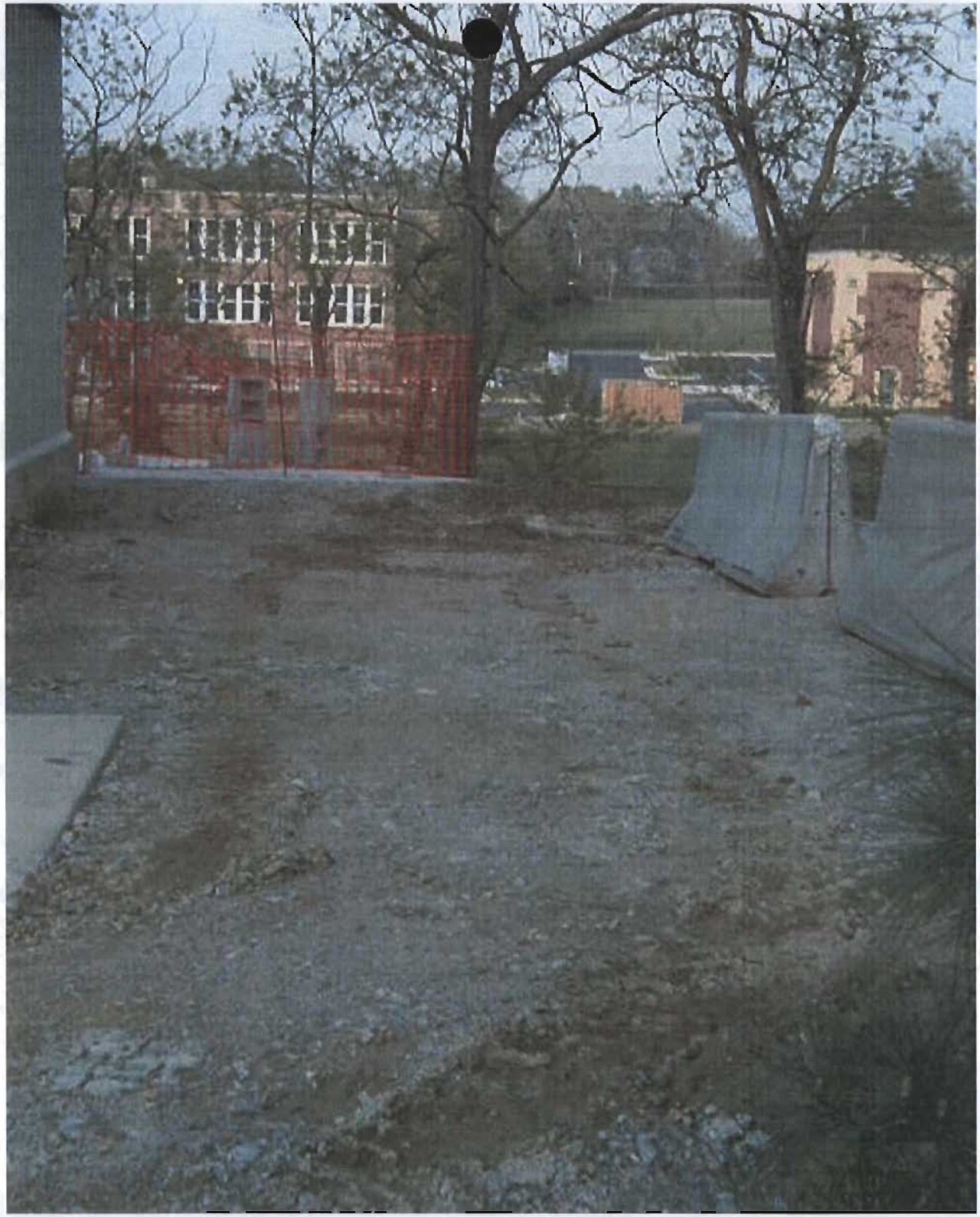
13E



Dec/
Winter
2001

B45F

13F



Fall
2002

127B BD 6B

15A B12A

13B

13C BA7C

Pat
7A
BA-3A

Pet
7B

Bat 7C

B4/13C

Jerry Jett trk thru picture.

Pet Ex 8

Bd 124

Ref No 10
BA 15

CITY OF BALTIMORE
MARTIN O'MALLEY, Mayor

DEPARTMENT OF LAW
THURMAN W. ZOLLICOFFER, JR., City Solicitor
101 City Hall
Baltimore, Maryland 21202

June 18, 2002

S.G. Samuel Moxley
Baltimore County Councilman
First District
County Council of Baltimore County
Courthouse
Towson, Maryland 21204

RE: 111 Mellor Avenue, Catonsville, Maryland 21228
Mayor's Office of Correspondence Tracking Number 02-7663

Dear Mr. Moxley:

With regard to the above referenced request from your office on behalf from your constituents, Ms. Susanne Gigliotti and Ms. Linda Amos, seeking leasing records while Baltimore City owned the subject property filed pursuant to the Maryland Access to Public Records Act, herewith please find enclosed the only two leases that exist with respect to this property. Our records reflect that this property has been used by the City for commercial/industrial heavy equipment storage and maintenance since 1938. The City has owned this property since 1923.

Additionally, enclosed please find a copy of the Baltimore County Code Enforcement Citation – Hearing decision concerning allegations of zoning violations. Please take the opportunity to enlighten your constituents based on the materials and information attached.

Respectfully,

Frederick C. Grant
Chief Solicitor

FCG/ecm
cc: File
Colleen M. Koerner
Mayor's Office of Correspondence

Printed on recycled paper with environmentally friendly soy based ink

MLS#: BC4320341

111 MELLOR AVE, CATONSVILLE, MD 21228
STATUS: ACTIVE
Ownership: Fee Simple, Sale
Legal Sub:
Adv Sub: Oth Fee: /mo pd
Project Name:
Lot-SF: 8370 Lot/Block/Square:
Lot-Acres: 0.19 Gross SF: 1200
#Lvls: 1 Net SF: 1000
Main Entrance: FAR:
Tax Map: Parcel: 1983
Comm/Ind. Type:
Location:
Basement: NO
Parking: On-site Prk/Sale, Prk Space Cnvys
Heat: Hot Water, Electric
Cool: None, None
TV/Cable/Comm:
Load:
Clear Span Ceiling Height:
Extra Unit Description: Professional Off
COMM/IND MISC:
INTERIOR: ,
EXTERIOR: Alum/Steel Siding, Brick, Concrete/Block, Shingle-Asphalt

PRICE/SF: $
CAM: $
C/C FEE:
TAXES: $194
Tax Year: 2001
Tax ID#: 04010113200001
Zoning: BM
Liber:

LIST PRICE: $190,000
Classification: Commercial
List Type: Excl. Right
Old Map: 41E03
TBM Map: 0000

Area: N/A
Age:
Year Built: 0
Occupied: NO
Folio:

#Garage/Carport Spaces: /
#Assigned Spaces:
Hot Water: Electric
Water: Public
Sewer/Septic: Public Sewer
Door Hgt Drive-in:
Number of OHD:

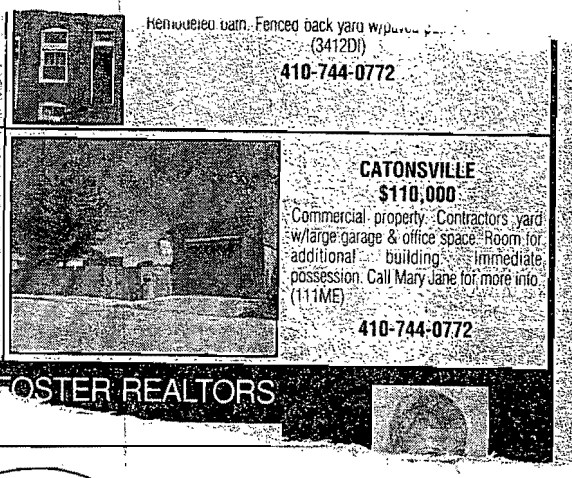
REMARKS: CONTRACTORS YARD WITH A LARGE GARAGE AND OFFICE SPACE. ALL ZONING CONFIRMED. IMMEDIATE POSSESSION. LARGE PARKING AREA. ROOM FOR ADDITIONAL BUILDING. ORIGINAL BUILDING CAN BE MODIFIED. CURRENT ZONING IS "BM." SQ. FT. ESTIMATED. CALL MARY JANE FOR MORE INFORMATION. 410-418-8140.
DIRECTIONS: BELTWAY 695 WEST ON FREDERICK ROAD TO LEFT ON MELLOR.

Broker: LONG & FOSTER REAL ESTATE, INC. Brkr Code: LNG45 Brkr Office: (410)461-1456
Brkr Fax: (410)750-8781

Listing Agent: MARY JANE MACGILL Agt Office: (410)461-1456 Home: (410)247-0299
Pager: (410)748-0148 Cell: (443)506-0461

Show Instructions: Call Office
Owner(s): XXXX XXXX H: (000)000-0000 O: (000)000-0000
Showing Contact(s): LONG/FOSTER LONG & FOSTER H: (410)461-1456 O: (410)461-1456
List Date: 18-SEP-2002 Orig Price: $190,000 DOM-MLS: 1 SubComp: 3.0 Dual: Y
Update Date: 18-SEP-2002 Prior Price: DOM-PROP: 1 BuyComp: 3.0 DesR:
Update Type: New Add'l: VarC: N
Disclosures: Property Condition:
Documents: Possession:
Cur Finance Type:
New Finance Types:

WATER
Water Oriented: N Water Access: N Water View: N Waterfront: N
Phys Dock Conveys: N Nav Water:
Vacation Prop: NO



© 2001 Metropolitan Regional Information Systems, Inc.: *Information is believed to be accurate, but should not be relied upon without verification.*

PET. EX.

17

As of April 15, 2004

PETITIONERS' EXHIBIT 19

15, 2004

ITIONERS' EXHIBIT 20

ER 15, 2004

PETITIONER'S EXHIBIT

21

As of December 15, 2004

Petioner's Ex. 20

As of December 15, 2004

Click here for a plain text ADA compliant screen.

Maryland Department of Assessments and Taxation
BALTIMORE COUNTY
Real Property Data Search

Go Back
View Map
New Search
Ground Rent

Account Identifier: **District** - 01 **Account Number** - 0113200001

Owner Information

Owner Name: GATEWAY PARTNERS LLC
Use: COMMERCIAL
Principal Residence: NO
Mailing Address: 3333 VELVET VALLEY DR
WEST FRIENDSHIP MD 21794-9430
Deed Reference: 1) /20092/ 8
2)

Location & Structure Information

Premises Address
111 MELLOR AVE

Legal Description
111 MELLOR AVE ES
1350 FT S FREDERICK RD

Map	Grid	Parcel	Sub District	Subdivision	Section	Block	Lot	Group	Plat No:
101	8	1983						82	Plat Ref:

Special Tax Areas **Town** **Ad Valorem** **Tax Class**

Primary Structure Built	Enclosed Area	Property Land Area	County Use
0000		8,370.00 SF	06

Stories	Basement	Type	Exterior

Value Information

	Base Value	Value As Of 01/01/2003	Phase-in Assessments As Of 07/01/2004	As Of 07/01/2005
Land:	10,800	33,300		
Improvements:	2,000	6,500		
Total:	12,800	39,800	30,800	39,800
Preferential Land:	0	0	0	0

Transfer Information

Seller:	D A DRENNER CONCRETE INC	Date:	05/20/2004	Price:	$85,000
Type:	IMPROVED ARMS-LENGTH	Deed1:	/20092/ 8	Deed2:	
Seller:	MAYOR & CITY COUNCIL OFBALTIMORE	Date:	03/17/2000	Price:	$12,500
Type:	NOT ARMS-LENGTH	Deed1:	/14361/ 556	Deed2:	
Seller:		Date:		Price:	
Type:		Deed1:		Deed2:	

Exemption Information

Partial Exempt Assessments	Class	07/01/2004	07/01/2005
County	000	0	0
State	000	0	0
Municipal	000	0	0

Tax Exempt: NO
Exempt Class:

Special Tax Recapture:
* NONE *

Pet. Ex 23

03-456-SPH
Drenner

Verified
12/22/04

Appellant Exhibits

Appel 1 Contract of Sale

2 Hearing Officer Op.

3 Final Order of Code Official 11/1998

4 DPW Directors Office Doc.

5 Fixed Capital Record

6A Letter - 3/1986

6B Letter - City of Baltimore -

7 Memorandum of the Petitioner to the Zoning Commissioner

8 Real Property Search - 108 Mellor Ave

9 Real Property Search 110 Mellor Ave

EXCLUSIVE RIGHT TO SELL LISTING CONTRACT

Date: 9/15/02

LONG AND FOSTER REAL ESTATE, INC. (the "Broker") is hereby authorized by the undersigned owner(s) (the "Owner") or by the authorized representative of Owner to sell, as the exclusive real estate broker, the property known as: 111 Heather Hill, Catonsville, MD 21228 (the "Property"). This authority shall continue until the 14 day of March, 2003 except that either Owner or Broker, by giving written notice, may cancel this Contract so that it will terminate at the end of 30 days from the date of receipt of such written notice. The Owner warrants to Broker that the information shown on the profile sheet for the Property executed by Broker and Owner (the "Profile Sheet") is true and correct. The Profile Sheet is incorporated herein as part of this Listing Contract.

The listing price of the Property is $ 190,000 and shall be the price advertised by Broker. If Owner desires to change the listing price, Owner shall immediately inform Broker in writing of the changed listing price, and such changed listing price shall thereafter be the price advertised by Broker.

Broker shall not be responsible for the care of, or the physical condition of the Property.

Broker is authorized to and shall market the Property, including entering the Property into the Metropolitan Regional Information Systems, Inc. ("MRIS"). Seller acknowledges that Broker is bound by the by-laws, policies and procedures, and rules and regulations governing MRIS.

This Contract shall be void (1) if Broker is not a participant of MRIS at the time of signing hereof or at anytime thereafter, or (2) if the Property is not listed with MRIS. Broker is hereby granted the right to report to MRIS for dissemination in accordance with MRIS's rules and policies (A) any contract of sale and sales price (including the other terms upon which any sale of the Property is made), and/or (B) that the Property is being multiple listed and the terms of such listing. Broker's responsibility to market the Property is suspended by Owner's acceptance of a written offer to purchase the Property.

Owner agrees to pay Broker a fee for services rendered in the amount set forth below ("the Fee") (a) if during the term of this Contract, or any extension thereof, (i) Broker produces a customer to purchase the Property at the listing price and on the terms herein or at such other price or on such other terms as shall be accepted by Owner or agreed upon in writing between Owner and Broker (the "authorized price"); or (ii) Owner shall enter into a written agreement to sell, exchange, convey or transfer the Property to any person or entity whether such person or entity shall have been procured by Broker, by Owner or by any other person or entity, in which event Owner shall within seventy-two (72) hours thereof furnish Broker a copy of such written agreement produced by anyone other than Broker; or (iii) if during the period of (_____) months following the expiration of termination of this Contract, Owner shall enter into a written agreement to sell, exchange, convey or transfer the property to any person who or any entity which, with knowledge of Owner or any agent of Owner, inquired or made inquiry about the Property or negotiated to purchase or exchange the Property during the term of this Contract or any extension thereof, in which event Owner shall within seventy-two (72) hours thereof furnish Broker a copy of such written agreement; except that Owner shall have no obligation to pay the fee to Broker if the Property is sold or exchanged by any other licensed real estate broker following the expiration of this Contract or any extension thereof or following the termination of this Contract as herein provided, unless such termination by Owner shall have been made for the purpose of avoiding the obligation of Owner to pay the fee to Broker.

The amount of Broker compensation is not prescribed by law or established by any membership organization with which the Broker is affiliated.

The fee to be paid by Owner to Broker under the terms of this Contract is (Circle One) 7% 8% 9% 10% of the sales price in a contract entered into by Owner, the authorized price or the listing price, as may be applicable (hereinafter the "Selling Price"), plus (N/A) month(s) ground rent, if any. In the event of an exchange, the fee to be paid by Owner to Broker shall be based on the listing price, plus (N/A) month(s) ground rent, if any. Seller will pay a $195.00 Administrative Fee to Long & Foster at settlement. If Broker prevails in any court action brought to obtain payment of the fee, Broker shall also be entitled to recover in such action Broker's reasonable attorney's fees and court costs.

If a deposit made on any contract of sale for the Property is forfeited to Owner, or if all or part of deposit shall be received by Owner as a settlement made by and between Owner and Buyer, Fifty Percent (50%) of the amount forfeited or received as settlement shall be paid to Broker for Broker's services, but in no event shall the amount exceed an amount equal to the full fee specified herein.

Broker shall be entitled to cooperate with other brokers as subagents of Broker ("Subagents") and/or brokers retained by prospective buyer's to represent buyer's interests ("Buyers Agents"). Owner consents to Broker's cooperation and fee sharing with Subagents or Buyer Agents (collectively "Cooperating Brokers"). Broker shall pay to any Subagent, who has earned and is entitled to share in the fee, $_____ or _____ 3 % of the Selling Price, plus (N/A) month(s) ground rent, if any. Broker shall pay to any Buyer Agent who has earned and is entitled to share in the fee $_____ or _____ % of the Selling Price, plus (N/A) month(s) ground rent, if any.

Regardless of any payment which may be due to a Cooperating Broker, Owner shall pay to Broker all amounts due and owing to Broker pursuant to this Contract irrespective of any dispute which may arise between Broker and Cooperating Broker. Broker and Owner agree that this Contract does not confer upon a Cooperating Broker any right to receive any payment directly from Owner.

FAIR HOUSING: With respect to race, color, religion, sex, national origin, handicap or familial status, the Property is offered in compliance with Title VIII of the Civil Rights of 1968, and the Fair Housing Amendments of 1988. The Property is also offered in compliance with the anti-discrimination provisions of applicable State and local laws.

LEAD PAINT: Owner acknowledges that the Property, if constructed before 1978, is subject to Federal law (Title X) as to the presence of lead based paint and/or lead based paint hazards. Owner represents and warrants to Broker, Broker(s) agents and subagents, intending that they rely upon such warranty and representation, that the Property was constructed (initial one section): X Yes during or after 1978; or _____ before 1978; or _____ Owner is uncertain as to the date of construction. If Owner is uncertain as to date the Property was constructed, Owner agrees that, for the purposes of the sale contemplated by this Listing Contract, the Property will be treated as though it had been constructed prior to 1978. If This X applies to the Property, Owner acknowledges receipt of brochure entitled "EPA and HUD Real Estate Notification and Disclosure Rule" from Broker, and Owner agrees to comply fully with the requirements as set forth in the Rule.

PROPERTY DISCLOSURE: Owner acknowledges that (a) Broker has informed Owner that any contract of sale entered into for resale of residential real property improved by four or fewer single family units is subject to the requirements of Section 10-702 of the Real Property Article of the Annotated Code of Maryland which obligates Owner to deliver to the Buyer of the Property either a written statement disclosing the condition of the Property, or a written property disclaimer statement, and (b) Broker has furnished to Owner the Maryland Real Estate Commission approved disclosure statement form.

Yes_____ No ✓ Seller permits Long & Foster to give Seller's name to an outgoing referral to a real estate broker in the area where Seller is relocating. Seller understands that Long & Foster and sales associate may receive a financial benefit for this referral.

This Contract shall be binding upon the respective heirs, personal representatives, assigns and successors of the parties hereto.

WITNESS:

_____ _____
Owner or Authorized Representative Date

By: _____ _____
Broker or Authorized Representative Owner or Authorized Representative Date

(4/96)

Prop. Owner
CBA NO 1

Baltimore County, Maryland
Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, Maryland 21204

CBA 2
Prop. Dwnk No 2

In the Matter of
D. A. Drenner Concrete, Inc.
Respondent

Civil Citation No. 00-1503
111 Mellor Avenue

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINAL ORDER OF THE CODE ENFORCEMENT HEARING OFFICER

This matter came before the Code Enforcement Hearing Officer for the Department of Permits and Development Management on 23 April 2002, for a hearing on a citation for violations under the Baltimore County Zoning Regulations and the Baltimore County Code for maintaining an office trailer without an occupancy permit and operating a contractor's storage yard on property zoned BM located at 111 Mellor Avenue.

Ed Creed, Sr., code enforcement inspector stated that the County received a complaint concerning the use of the property and/or the storing of an office trailer on the property. The property was inspected and the inspector found an office trailer on the property without a permit. He also found a concrete masonry and excavation business at the subject property.

On 3 January and 28 January 2002, written correction notices were pursuant to §1-7(c), Baltimore County Code (hereinafter "BCC"), which described with particularity the nature of the violation and the manner of correction. The correction notices were served on the Respondent.

On 31 January 2002 and 5 March 2002, code enforcement citations were issued pursuant to §1-7(d), BCC. The citations were marked in evidence as Plaintiff's Exhibit 1 and 1A and were legally served on the Respondent. The citations described the violations as follows: Baltimore County Zoning Regulations, §415.5; 415.6; 415.3, failure to obtain an extended occupancy permit for an office trailer. BCZR, §101; 102; 1; 1B01.1A, ZCP, §500.9; 500.6; 500.1(A)(B), BCC, §26-121A, failure to cease the operation of a contractor's storage yard in a DR (SIC) zone without the benefit of a non-conforming use. No approved site plan.

Baltimore County, Maryland
Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, MD 21204

Prop. Owner No 3
CBA

IN RE: BALTIMORE COUNTY UNIFORM CODE ENFORCEMENT CITATION	*	BEFORE THE
CODE ENFORCEMENT HEARING	*	CODE OFFICIAL
Mayor & City Council of Baltimore City	*	Citation/Case No. 98-2180 111 Mellor Ave.
D.A. Drenner Concrete, Inc. Respondents	*	

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINAL ORDER OF CODE OFFICIAL

This matter comes before the Code Official pursuant to §1-7, Baltimore County Code, for consideration of a code enforcement citation issued to the respondents named above by the Division of Code Inspections and Enforcement, Department of Permits and Development Management for violations allegedly occurring at the property known as 111 Mellor Avenue and zoned BM.

The respondent, D.A. Drenner Concrete, Inc. (hereafter "Drenner") did appear and was represented by Ben Bronstein, Esquire.

The respondent Mayor & City Council of Baltimore City (hereafter "City") appeared and was represented by Justin J. King, Esquire, Special City Solicitor.

Appearing and testifying for the respondents were Darrel Drenner and Alva Johnson, Jr.

This code enforcement hearing was duly scheduled, and was conducted on the 27th October 1998.

Testimony was taken from Hope Jacobson, code enforcement inspector.

Proposed CBA No 4

34

1886 John C. Dietler, Jr. to Mayor & City Council of Balto.

DELIVERED PER TICKET JUL 22 1925

This Deed made the ninth day of February in the year nineteen hundred and twenty-five by John C. Dietler Jr. and Elizabeth G. Dietler his wife of the City of Baltimore, State of Maryland parties of the first part unto the Mayor and City Council of Baltimore a municipal Corporation of the State of Maryland party of the second part.

Whereas the Public Improvement Commission, acting under the authority vested in it by the acts of 1910. Chapter 373. and the Ordinance of Estimates for the year 1924 has purchased the hereinafter described property to be used by the Water Department of Baltimore City at and for the sum of Four thousand five hundred dollars. ($4,500.00)

And whereas the entire amount of the purchase money has been paid by the party of the second part hereto to the said parties of the first part hereto the receipt of which is hereby acknowledged.

Witnesseth, That in Consideration of the premises and of the sum of one dollar, the receipt whereof is hereby acknowledged, the said parties of the first part do grant and convey unto the said Mayor and City Council of Baltimore, its successors and assigns in fee simple, all that piece or parcel of land situate, lying and being in the County of Baltimore, in the State of Maryland, which is described as follows, that is to say:

Beginning for the same on the east side of Wellow avenue, at the distance of 156 feet south from the southwest corner of the land described in a lease from Henrietta R. Glenn et al. Trustees, to the Catonsville Short Line Railroad Company, dated November 8th 1884 and recorded among the Land Records of Baltimore County in Liber W. P. C. No. 140. folio 177 &c. running 157 feet 8 inches more or less southerly from the southwest corner of Mel-

R. P. #2

FIXED CAPITAL RECORD—LA

PROPERTY Catonsville Store Yard

LOCATION Mellor Ave. S. of Frederick Road - Catonsville

USE Store Yard - Bureau of Water Supply

AREA 0.5 Acre (Approx.)

DESCRIPTION Rectangular Lot on East Side Mellor Ave. 1357' South of Frederick Road Size of L

Prop No 5
CBAS

STATUS OF TITLE—ENCUMBRANCES—RESTRICTIONS

Fee Simple

RENTAL RECEIVED—TERMS OF TENANCY

Not Rented

AVAILABLE FOR SALE OR RENTAL

None

PLAT No.*	PARCEL No.	DEED No	KIND OF INSTRUMENT	DATE OF INSTRUMENT	GRANTOR	RECORDED	CONSIDERATION	L
446	410	5800	Deed	2-9-1925	John C. Diatler	WPC 607-341	4,500.00	Fe

09/17/98 14:43 SEP-17-1998 13:08 410 837 8225 DPW-OFF. OF PERMITS NO.571 P.01/01 002

Howard L.
Chertkof
& Co.

SQUARE FOOT SPECIALISTS

Commercial and Industrial Realtors

19 West Franklin Street
Baltimore, Maryland 21201
(301) 727-2330

March 6, 1986

Prop. Comm
CBA-6A

Mr. Francis Kuchta
Director of Public Works
Baltimore City
Room 600
Municipal Building
Baltimore, Maryland 21202

Re: Former Yard Water Department
Mellor Avenue
Catonsville, Baltimore County
Maryland

Dear Mr. Kuchta:

I am writing you today at the suggestion of Dick Hutchings and Richard Lidinsky. The Catonsville Mellor Ltd. Partnership, of which I am the general partner, owns property at 85-105 Mellor Avenue in Catonsville consisting of some commercial buildings and the former Catonsville Shortline Railroad. The City owns a small lot of ground adjoining our property formerly used for the storage of water pipes, sand and gravel, etc. but in recent years it has not been used for any purpose that we can observe. We would be interested in acquiring this property and request that if you determine that it is excess to the City's needs that the process of appraisal may be started so that the property may be valued and we may arrange to purchase it. For your easy reference I am enclosing a copy of the tax plat showing the property marked in yellow and a copy of a map showing the general area. I want to thank you in advance for your help in this matter.

Sincerely,

Howard L. Chertkof

Howard L. Chertkof

HLC/cb

Enc.

cc: Mr. Richard Hutchings
Department of Real Estate
Baltimore City

Mr. Richard Lidinsky
Comptrollers Office
Baltimore City

CITY OF BALTIMORE

WILLIAM DONALD SCHAEFER, Mayor

DEPARTMENT OF PUBLIC WORKS

FRANCIS W. KUCHTA, Director
600 Municipal Building, Baltimore, Maryland 21202

Prop Owner

CBA 6B

March 14, 1986

Mr. Howard L. Chertkof
19 West Franklin Street
Baltimore, Maryland 21201

Re: Mellor Avenue Water Yard in Catonsville, Maryland

Dear Mr. Chertkof:

The Bureau of Water and Waste Water of this department has maintained a small yard on Mellor Avenue which houses both men and material at the present time. This yard has existed for many years. The location of the yard provides service to Catonsville and adjacent communities in the maintenance of the distribution system. The overall efficiency of the crew is enhanced by use of this location.

Currently there is no plan to discontinue the use of the yard. Relocation of the crew to existing facilities is not practical at this time. I sincerely hope that the aforementioned clarifies this department's position as to the subject property.

Sincerely,

/SIGNED/ FRANCIS W. KUCHTA

Director

FWK:JST:mjb

cc: Mr. Richard Lidinsky
Mr. Richard P. Hutchins
Mr. Jay S. Thorpe
Mr. Lawrence E. Hudson

LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

Misc 7

CBA 7

September 12, 2003

RECEIVED
SEP 12 2003
ZONING COMMISSIONER

VIA HAND-DELIVERY

Zoning Commissioner
Suite 405
County Courts Building
Towson, Maryland 21204

Re: 111 Mellor Avenue
Case No.: 03-456-SPH

Dear Mr. Commissioner:

Enclosed herewith, as directed, is the Memorandum of the Petitioner, for your consideration in deciding this case.

Very truly yours,

Michael P. Tanczyn, Esquire

MPT/cbl

cc: clients
Benjamin Bronstein, Esquire
Peter Max Zimmerman, Esquire

111 Mellor Avenue	*	**BEFORE THE**
N/east side Mellor Avenue,		
1,383 feet south of Frederick Road	*	**ZONING COMMISSIONER**
1st Election District - 1st		
Councilmanic District	*	**OF BALTIMORE COUNTY**
Legal Owner:	*	
D.A. Drenner Concrete, Inc.		
	*	
Petitioners:		
Linda J. Amos and	*	
Susanne Gigliotti		**CASE NO.: 03-456-SPH**
	*	

* * * * * * * * * * * * *

MEMORANDUM OF PETITIONERS LINDA J. AMOS AND SUSANNE GIGLIOTTI

NOW COMES Petitioners, Linda J. Amos and Susanne Gigliotti, by their counsel, Michael P. Tanczyn and submit the within Memorandum to assist the Zoning Commissioner in answering the questions raised in the Petition For Special Hearing.

FACTS

The testimony and documentary evidence introduced at the hearing held August 13, 2003 before the Zoning Commissioner, the Honorable Lawrence Schmidt showed that this .1921 acre lot comprising 8,368 feet, more or less, located on the east side of 111 Mellor Avenue, to be split zoned BM and DR2. By history, the property had been owned beginning February 9, 1925 by the Mayor and City Council (Drenner, Exhibit 4). The property had been used by the City of Baltimore as a maintenance yard to house a Baltimore City water department utility repair truck with several open outdoor bins and one building, according to the testimony of Shirley Marr of 100 Mellor Avenue, who had lived in the neighborhood since 1950, as well as the testimony of Jerry Jett, who had lived at 106 Mellor Avenue since 1967 and who had worked for Baltimore County and hauled materials to the site. An additional long-time resident, James Bossert of 88 Mellor Avenue, who had lived there since 1967 also testified similarly as to the use of the site made by Baltimore City. Those parties testified that in approximately 1987 or 1988, the City stopped using the property and the materials had been removed. The City then leased the property two times, as indicated by the letter from the City Solicitor's Office and Councilman Moxley, dated June 18, 2002 (Petitioners' Exhibit 10). That letter had forwarded two leases to Councilman Moxley. The first indicated that the property was leased to Nicodemus Construction Company, by lease dated October 24, 1990, with a start date of November 1, 1990 for the stated use of a carpentry shop and storage of materials. The testimony of the residents and even Darryl Drenner, was that that use had continued for at least a year, if not longer, at the site. That lease was introduced as Petitioners' Exhibit 2. Petitioners'

Click here for a plain text ADA compliant screen.

Maryland Department of Assessments and Taxation
BALTIMORE COUNTY
Real Property Data Search

Go Back
View Map
New Search
Ground Rent

Account Identifier: **District** - 01 **Account Number** - 0113750990

Owner Information

Owner Name: AVERSA JENNIFER
AVERSA RICHARD

Use: RESIDENTIAL

Principal Residence: YES

Mailing Address: 108 MELLOR AVE
BALTIMORE MD 21228-5142

Deed Reference: 1) /19555/ 324
2)

Location & Structure Information

Premises Address
108 MELLOR AVE

Legal Description
108 MELLOR AVE
1400 S FREDERICK RD

Map	Grid	Parcel	Sub District	Subdivision	Section	Block	Lot	Group	Plat No:
101	8	309						80	Plat Ref:

Special Tax Areas **Town**
Ad Valorem
Tax Class

Primary Structure Built	Enclosed Area	Property Land Area	County Use
1934	984 SF	9,050.00 SF	04

Stories	Basement	Type	Exterior
1 1/2	YES	STANDARD UNIT	SIDING

Value Information

	Base Value	Value As Of 01/01/2004	Phase-in Assessments As Of 07/01/2004	As Of 07/01/2005
Land:	42,510	42,510		
Improvements:	60,670	75,220		
Total:	103,180	117,730	108,030	112,880
Preferential Land:	0	0	0	0

Transfer Information

Seller:	GIGLIOTTI SUSANNE L	**Date:**	02/04/2004	**Price:**	$179,900
Type:	IMPROVED ARMS-LENGTH	**Deed1:**	/19555/ 324	**Deed2:**	
Seller:	HOOK KAREN L	**Date:**	08/04/1999	**Price:**	$104,450
Type:	IMPROVED ARMS-LENGTH	**Deed1:**	/13936/ 409	**Deed2:**	
Seller:	CALLAHAN MICHAEL P	**Date:**	09/28/1995	**Price:**	$105,500
Type:	IMPROVED ARMS-LENGTH	**Deed1:**	/11234/ 687	**Deed2:**	

Exemption Information

Partial Exempt Assessments	Class	07/01/2004	07/01/2005
County	000	0	0
State	000	0	0
Municipal	000	0	0

Tax Exempt: NO
Exempt Class:

Special Tax Recapture:

* NONE *

Appl Ex. 8

Click here for a plain text ADA compliant screen.

Maryland Department of Assessments and Taxation
BALTIMORE COUNTY
Real Property Data Search

Go Back
View Map
New Search
Ground Rent

Account Identifier: **District** - 01 **Account Number** - 0108651010

Owner Information

Owner Name:	BOLTON JAMES G SHUEY GRETCHEN M	**Use:**	RESIDENTIAL
		Principal Residence:	YES
Mailing Address:	110 MELLOR AVE BALTIMORE MD 21228-5142	**Deed Reference:**	1) /20720/ 14 2)

Location & Structure Information

Premises Address
110 MELLOR AVE

Legal Description
110 MELLOR AVE WS
1449FT S OF FREDERICK RD

Map	Grid	Parcel	Sub District	Subdivision	Section	Block	Lot	Group	Plat No:
101	8	308						80	Plat Ref:

Special Tax Areas **Town** **Ad Valorem** **Tax Class**

Primary Structure Built	Enclosed Area	Property Land Area	County Use
1910	2,868 SF	18,100.00 SF	04

Stories	Basement	Type	Exterior
2	YES	STANDARD UNIT	ASBESTOS SHINGLE

Value Information

	Base Value	Value As Of 01/01/2004	Phase-in Assessments As Of 07/01/2004	As Of 07/01/2005
Land:	44,770	44,770		
Improvements:	107,680	136,010		
Total:	152,450	180,780	161,893	171,336
Preferential Land:	0	0	0	0

Transfer Information

Seller:	AMOS STEPHEN	**Date:**	09/21/2004	**Price:**	$475,000
Type:	IMPROVED ARMS-LENGTH	**Deed1:**	/20720/ 14	**Deed2:**	
Seller:	HOUSEHOLD FINANCE CORP III	**Date:**	11/20/2000	**Price:**	$170,000
Type:	IMPROVED ARMS-LENGTH	**Deed1:**	/14818/ 163	**Deed2:**	
Seller:	DOYLE JAMES P,SR	**Date:**	09/27/2000	**Price:**	$220,599
Type:	NOT ARMS-LENGTH	**Deed1:**	/14719/ 655	**Deed2:**	

Exemption Information

Partial Exempt Assessments	Class	07/01/2004	07/01/2005
County	000	0	0
State	000	0	0
Municipal	000	0	0

Tax Exempt: NO
Exempt Class:

Special Tax Recapture:
* NONE *

Appell Ex 9.

Board Notes
Drenner
(3-5-6)

03-456-SPH Metter Ave Property

Appeal from ZC Order granting Petition

Bronstein, Benjamin - Owners - Gdachowski
Tancyn - Petitioners

Preliminaries

1) Motion to add Petitioner - Lewis Kubiet

Original Petitioners have sold their properties since ZC hearing

2) Motion to dismiss since Drenner sold property since ZC hearing

RE: Standing - Appellee/Owner also sold: no longer

Bronstein - Preliminary

1) Moves to dismiss Amos and Gigliotti as not having proper standing since they have moved.

1A) Argues Kubiak's can't be added
s/b
No proper parties; case dismissed

1B) Issue is filed against property, not owners

BR 3.5 - small part of zone; most bus
major

Prenner bought property after Hearing, when ZC determined yes nonconforming use

ZC Shapiro

2) Says had authority to determine nonconforming use

Cites 500.6 & 500.7

Title 6 - BC

Code Enforcement

ZC has authority but not exclusively Code Enforcement Official may hear also

Zimmerman

RE: Stands

1) Diff criteria for standing in an admin hearing than a Court

General rule for Admin Hearing - anyone interested may be a party

Sect 100.7

∴ Petition may be brought by anyone in area

Community and owner are still interested people

2) In an enforcement proceeding can a HO hear a

Board accepted new Petitioners

03-456-SPH Mellor Ave Prop.

Case

Tanczyn - Petitioners

Pet 1 Zoning map shows no change since Rezoning

Testimony - Cigliotti - Johnson
7901 Tilmant Ave Parkville

Petere lived across from subject prop.
Since 1999
moved 2003

When moved to Catonsville -
Premier had 1-2 P/U trucks
In and out throughout day.
2000-01 activity increased
5-6 3/4 ton trucks
2 Dump trucks
Backhoes
Concrete Co.
Became nuisance
Originally not a problem.

2001 - Began keeping log to track activity - time of arrival of trucks; noise level; # of vehicles etc.
Cutting rebar in yard with chainsaws
15-20 employees - loading materials in front of home.

Small property - large trucks.

Photos from 1999 through time of hearing

Pet 2 Photos from hearing below

A View from Guillotti Front porch. taken 2002 - corner of Drenner prop

B View from Kubiett house showing property

Pet 3 Photos from below Fall 1999

A Old fence. Shed on Drenner prop Gate is across from Guillotti house

B Shows Armory land cleared for use by trucks.

C Shows how far trailer goes back

D Truck parked on clear

Pet 4 Fall 2001 Photos taken

A Early morning shows line of trucks about 2 Am

B Workers loading rebar near that Drenner prop.

C Volume of vehicles

D Front entrance of prop.

E More stuff

F Load of gravel dumped off

G A second day / Trucks

4 H

J

K Truck parked halfway on road

[Generally photos show vehicles using road beyond prop itself -]

4 L Same

M Dump truck on street

N Ran water line into shed

O Truck in front of her house

P. and elsewhere on street.

Mellor Ave Property.

Pet 5 A - F — Photos 2002 - Office Trailer on DR 2 side of prop.

Fall 2002
Pet 6 A-B — Clearing of Armory property
Armory left barriers to buffer their property.
Despite chain still used Armory prop

June 2002 - Property was cleaned except for 2 trailers
~~They were removed~~

Pet 7 A-C — Summer 2002 - Before hearing - Shows prop after Dremer left
shows vacant property
C - For Sale sign
Zoning hearing sign.

Dec 2003 - moved from property

From 2002 + when she moved Dremer property remained vacant

Pet 8 — Zoning history of property
include Reclass Petition from Res to light Industrial - Denied - Nov. 9 1953

Jan 13 1954 - Date of Order
denying relass to Light Industrial

Peter 2 - shows prop was Res. - 1953

Pet 9 Lease

Pet 10 Lease with Drenner
Aug 1 1993

Pet 11 Deed March 2000 - selling
prop to Drenner

Pet 12 Deed - Armory property
Rejected

Pet 13 Photos - Summer 2002
After Drenner moved out
A Abandoned - Photo of Shed
B Fence with For sale and
Zoning hearing sign
C Same

Pet 14 Photo by neighbor mid-late 1990s
Shows original property before
land cleared next to shed

Pet 15 Transmittal letter for leases
from Councilman Moxley's office

Pet 16 Listing of property for sale
- Significant -
Contractors yard; zoning confirmed
Same before

Mellor Ave Prop.

Zimmerman

Financial analyst T Rowe Price

When looking at prop prior to purchasing in 1999, when familiar with Mellor?
A Spring 1999
A Settled July 1999

Use of prop when moved in?

A 2 P/U Trucks - That's seemed all.

Q When expanded operations?
A Array property cleared in fall
Fall 1999 - most of new equipment purchased

Q Operations ended?
A June 29 2002 - everything was gone. Never saw Darryl again

A Next 18 mos - prop. remained vacated

Q Did you discuss expanded use with Darryl?
A Not pleasant, often at 5:30 AM

Q Research on zoning?
A That's when I found it was DR & BM

A Continued to be vacant after I moved out.

Bernstein Cross

Describes changes to property -
metal fence to stockade
Brick facade on shed. - Better?
A. Yes - aesthetically
Vacant - How do you know?
See equipment?
A No
Back end of milk truck only
Concrete storage bins - see inside?
A Nothing in them - weeds
Garage - anything in it
A Don't know

Leave for work - 8-5:30
Wouldn't observe activity on property during day?
A. There were times I was home and no activity

Current residence on Tillmont Ave in Parkville
No daily involvement on Mellen Ave now
A No

Q Armory - Vehicles?
A. Don't know if trucks - never see anything besides Lithuanian Fest.
Never see much activity there
Once a month would see National Guardsmen jogging
Q No Humvees?
A No

Mellor Ave Property

Q Buildings on other side of Mellor?

A 1 story yellow cement block bldg.
Entrance between Mellor &
Several types of businesses

On your side of Mellor any commercial?
A No

Q Traffic on Mellor exclusive of Drenner
A Not that much
private entrance off Frederick into Mens
Other streets nearby more heavily
trafficked

Testimony - Amos

Linda Amos
Catonsville
1 block up and 2-3 streets over
from Mellor Prop.
Lived here since Aug 2004
110 Mellor Ave - before - directly
across street lived for
4 years Oct 2000

Observed all same activity as
Ms. Giglio - helped her get
records etc

Working in DC 2000-01
Commuted to DC Oct 2000 - Jan 01
9am 7pm
In Jan. CPA - brought work home
2 to Dec 2001

Home every day that year

Sept 01 – Law School started, still at home a lot until Aug 04

Jan 01 – Dec 01 Activity –
Noise level etc as Gigliotti testified
Back during day, constructing
welding inside yard.
Loading & Unloading done on Mellen Ave
not in yard.
Often used entire lane for activity

In 2002 – Summer – OT for part of summer then
returned 3rd wk of July – all equipment
gone. Activity ceased

Only activity after July 02 – Darryl
or foreman showing prop to sell.
Then listed prop

After ZC Hearing in 2003 until you
moved what activity?
A Nothing until Aug 04
Occasionally someone viewing the prop
but nothing else going on.

Pet 17 Photos April 2004

Since ZC Hearing in 2003 how often
present on Mellen –
A Every day until I moved.
During day.
Left occasionally for class etc.
Studied at home.
Office faced street

Mellon Ave

Activity?

A. Once or twice owner with guys - cleaning out garage.

A Nothing else in building after that
After hearing - maybe June / July 03
Saw Darryl

Sold 110 Mellon Aug 04

Zimmerman Cross

Not coming from Cadensville
May 2000 began looking for home there

Q After you moved in, changes in operations at 111 Mellon Ave

A When we bought didn't look like Drennen prop used much
Possibly not there at times of activity
Shortly after we moved in began noticing activity

~~When she spoke to Darryl~~

Trailer added to prop @ 2001, Winter

House directly across street from prop

Along West side Mellon how many homes?
A 3-4 blocks of SF homes on W. side
Drennen prop on E side
Aramary on W. side

Bernstein Cross

Glenwood Ave - where in Catonsville
r Frederick and Edmondson

Leg detailed examination of business
in area on Frederick in downtown
Catonsville

When a law student:
gave between 10-11 and 1-2
home in morning and before school ended
@ 9 Am and 3:30
Working for a business out of home
Then worked for Title Company - worked
r 2-9 at night

Aug 30, 2004 - Sold Mellor Ave House

Mellor Ave Property

Testimony –
Lewis Kubiet
116 Mellor Ave
July 1977 – continuously to present
Grew up in Catonsville
Attended School behind subject property
late 1950s to mid 1960s

Can see subject property from current res
storage shed / yard

Use in 1950s-60s – storage for water trucks
by Balt. City. Bins – shale etc for
fixing watermains

In 1977 – same use of property

Pet 18 Photo – June 1969 –
upper right of photo chain link fence
and brown storage shed.
Shows City use of property

After 1977 –
Mid 1980s City ceased using property.
Only activity – stored truck in shed.
No other

@ 1986 City activity ceased. Door of
shed closed.
Other prop stored on site – Concrete bins
box body of truck
Trailer part of tractor trailer

Contractor – Nicodemus – 1990, used
property (Finish carpenter) stored

materials on property.
Sometimes used shed.
Continued until 1991 - left
Only thing remained was shale etc
left by city

Vacant for over 2 years until
1993 - Drenner began using prop.

Level of activity - after 1993
[same testimony as earlier]
Limited to 2 trucks initially, then steady
progressed

~~Fall~~ June 2002 - ~~left~~ Drenner Left
Only 1 frontend loader remained -
for a period of months
Pet 17 - Photos of 2004 -

Manager IRS - employment

Manages office in downtown Balt and
2-3 other locations
4x week at his own house
also works from home

Only other activity - occasional
Gate left open for several months
after equipment removed, until
new owner took over

Pet 19 - Yard with Dumpster

Pet 20 - Rest of yard
Pet 21-22 Other photos of prop
in Dec 2004

Mellor Ave Property

Zimmerman Cross

No request to change zoning in recent years
BM | DR2 Zoning - when?
Does not know
No other zone designated on prop.

- Brainstein Cross -

Can see into prop. from front porch and house.

Sometime after Dremer left property, city trailer moved.
Storage shed remains from when city owned.

What did city store? in shed
Truck
What did city store in bins?
Crush stone shale etc.

Dumpster - on prop when Dremer left; still there. Not dumped

Q "Stored" in dumpster
Whatever was in there, still.

~~Testimony - Kubiet, Cindy~~
Proffered Testimony
Accepted - same as husband

- Appellant -

Testimony - Wayne Odoochauski
Owner,
In real estate
Gateway Partners - rehab of
commercial & res prop.
April 2004 - bought property from
Drenner

When observed - before buying about 6 mos
contractors yard, shed still has before buying
materials in it.

Now uses shed for storage
Plans to use for contractor storage
Would store a pick up truck often
equipment
Also store equipment - OC, MD

Gate not locked when first looking at;
doesn't recall whether gate was open

Zimmerman Cross

April 2004 - bought prop.
Did not see ZC opinion when he
bought property.
Did not know of zoning issues with
property.

Mellar Ave Property

Bus. Major Zone - wide open - "thinks"
Thinks it is permitted use?
Irrelevant

Tanczyn Cross

Q When did you learn of pending zoning case?
A After settlement - dont recall
Knew there was an issue, but not the process

~~Zimmerman~~

~~Shatin Day 2~~

Timeline

* Nonconforming (5 times)

1925 - Ownership by City as utility yard

* 1987/88 - City stopped using site

* 1990 - Lease to Nicodemus for Carpenter shop use changed.
[use permitted]

* 1991 - roughly - site vacated
remained owned by City

Aug 1993 - Drenner leased * use changed
as office and storage then for trucks

1998 - Zoning Code Violation Hearing

March 2000 - City sold prop to Drenner

Spring 2002 - Drenner began move

* June 2002 - Property vacated

Spring 2002 - Second Zoning Code Violation Hearing

Aug 5, 2002 Code Enforcement decision

Sept. 30, 2003 ZC Decision

May 20, 2004 - prop sold to Gateway

Section 400.B – Height
Accessory Structures in 15'
Res Zones

Prenner Concrete

I Standing - moot

II Code Enforcement Official - Can he determine Nonconforming use
- Per

III Collateral Estoppel - Not involved
Res Judicata - here
CEO - did not have all facts

IV Doctrine of Laches - first brought up in brief not litigated
no need to discuss

V
Based on Pan American case
City was subject to Conty Regs
∴ had nonconforming use
Candada Tavern Case -
no intent

VI Not proper before board -
lunch issue

Main Issues

1) Standing -
Appeal brought by owner of ZC op which holds unless we reverse.
No standing issue

2) Was property ever nonconforming?
A) If when owned by City it was exempt, then no [Schmidt op] and when bought by Drenner BCR applied
B) If not exempt, yes it was nonconforming until use first stopped in 1987 or 1990 or 1991 or 2002

3) Do we need to address issue regarding Code Enforcement Officer? Does she have right to determine what is/isn't nonconforming?
A. If right, was determination correct?
- No. too many instances when use lapsed CE Officer was wrong.

4) Doctrine of laches — No Delay here
How could petitioners have been negligent when they continuously sought zoning help with property

— Did we hear evidence from 1998 and 2002 zoning hearings - If not, this is new and we have no evidence

~~Shatin Day 2~~
Mellen / Drennen

check 1) BCZR 500.7 ZC authority over nonconforming uses

Must determine existence first through SH

↕ compare

2 BCC Sect 3-6-102
3-6-201 - "enforce and seek correction" seems limited

3) If a nonconforming use designation had never been requested - does it exist? Tanczyn argues NO, p. 11.
BCC Sections 32-3-102 32-3-601 32-3605
p. 15

Bransten p. 9 Do CE officer and ZC "share authority"? Can the CE officer "interpret" the law?

check 4) Find notes from Ramsay decision regarding intent (Bransten p. 13) In Ramsay opinion

5 Standing issue -
Moot Pet did not bring appeal; PC still involved in case

Nonconforming Use - Sect 101 BCZR
Sect 104

Per 3-6-201 ff - Code Officer enforces but does not decide/create regs.
Can he determine something is nonconforming if no Hearing?

(1)

12/22/04 - CBA-~~03~~-03-456-SPH ~~Brattleboro Property~~ 111 Mellor Avenue Property

Petitioner.
Michael P. Tanczyn.

Appellant
Benjamin Bronstein

People's Counsel.
Pete Zimmerman

Preliminary Matters
Motion to Add a Petitioner.
A mortgagee sold property assume for the property

Drennan has sold the property. Motion to dismiss

Bronstein -
Parties cannot be added.
Part of property zoned business Major; rest DR 5.
Baltimore City owned property
Baltimore City sold property to Drennan
2 Hearings re use of property - Shopping for it was non-conforming use. & Res adjudicata

BC Code 500.7.

Zimmerman -
Memo
Dorsey v Baltimore AME Church - parties

32-32: Moved H.O. file from below.

Pet Ex 1 - Current Zoning Map.
Susanne Guglietti Johnson - lives at 7901 Talbot Ave Parkville

Lived at 108 Mullen Ave. in 1999. Moved to Pulaski in 2003
When she moved to property, Drennan had 3 trucks parked at property.
2000-2001 - Activity increased. 5 or 6 3/4 T. dump pickup trucks, cement mixers Bush hog's etc
Effect of vehicles - Destroyed her quality of life. Started keeping a daily log.
Times that activity started:
Cutting relocs in the yard. Had 15-16 cars where parked on street in front of house.
Bush hog beeps of trucks.
Took pictures -

B.I Ex 2A - Photo - Orig. view to left for her front porch
~~B~~ - N.W. corner of asphalt pad
B - Photo - View from Kulet house. Shows Drennan property. Arrows. cones. land across ST.
B.I Ex 3A - Photo - property facing. Trash pushed on property at corner - Gates
3B - Photo - Land cleared South of his property - cleared by arrows
3C - Trailer - shows property cleared
3D - Photo - Trash in cleared property

B.I Ex 4A - Photos - fall 2001, Shows trucks
~~4B~~ - Bush hog etc.
4B - Workers loading relocs on Mullen Ave
4C - Trucks in yard.
4D - Front entrance of Drennan property. Shows 18 wheelers
4E - Close view of equipment
4F - Load of gravel.
4G - More workers loading trucks

4H - Loading trucks
4I - Workers vehicles on attorney and J Street
4J - Using army property
4K - Trucks bringing out on board. Trailers and cargo
4L - Truck bringing out in street
4M - Dump truck on street.
4N - Showing running water line into property
4O - Truck parked on Greg. side J Street
4P - Another photo.

Bd Ex 5-A. } Photos in 2002 - When office trailers were
B. } installed on property

Photos
Bd 6A - Fall 2002 - Showing area covered by Army Barriers
6B - Chain put across property

Summer of 2003 Drennen removed equipment from the property -
Heavy trailer removal. Milk truck
Trailer not there
Bd 7A - Photo 2003 Property after Drennen left.
7B - " " Showing property vacant
7C. " " " " " For Sale Signs

Galgoth moved Dec 2003 Further of lot pictures till this she moved - no one used of property

Bd Ex 8 - Petition for Zoning Reclassification
Adopted Nov 1953.
Order June 13, 1954
Bd Ex 9 - Lease from Bolton City to Nicholas Contracting subject property
Bd Ex 10 - Lease Bolton City & Daryl Drennen.
8/1/93

Bd Ex 11 - Deed B. City to Dremmes.
ID only Bd Ex 12 - Deed from B. City to State of Md.
Rejected Ex.

Bd Ex 13 A - Photos - Summer 2002 - Showing Shed & fence
B - " " Property for sale sign & zoning
C - " " " " " "
Bd Ex 14 - Late 1990's photos showing property & debt
Bd Ex 15 - Transmittal letter from Counsel Murphy
Bd Ex 16 - Multiple listing

Cross - Zimmerman.
Johnson Fine employed for T. Nan Pines
Purchased house 7/1/99. When she was looking at property Dremmes had 2 large pick up trucks on property. Fall of 1999. Most of additional equipment purchased.
6/29/02 - Operation ended for Dremmes Contr.
Property remained empty until they moved out.
Prior zoning was BM - Business Major & Density DR 5
Property still vacant as far as she knows
No use on property.

Cross Bernstein:
Chain link fences at front Dremmes put up stockade fence & Red brick front on shed.
Aesthetically more pleasing.
Did not see any Dremmes equipment. Red counts story lines - looked into lines
Nothing there.
Did not know if Dremmes kept equipment in shed.
Came here 2-3 times per month during day
nothing
Lives on Palmer Ave in Parkville

20 miles from Tilbert to Mellon Ave. No. daily involvement with Mellon Ave.

She has no interest or home on Mellon Ave. Nat & Carol Arnoy. Lived at home the street. Does not know if they have trucks. Does not see Mellon vehicles.

"Building behind of Mellon. - 1 story block building low pitch roof. Height indeterminate, looking - seeing shop.

Has seen of Mellon Ave.

Entrance to shop. Means is from ~~[illegible]~~ Frederick Road.

Brenda Arnoy. - 21 Colonial Ave Catonsville.

1 Block up & 2-3 streets over from Mellon.

Been there since end of August 2001

Lived at 110 Mellon Ave - Lived there 4 years - Since Oct 2000.

Heard Guillotin's testimony - Adopt. Only testimony.

Worked in D.C. from Oct 2000 - Oct 2001.

Commuted to D.C. 9 AM to 7 PM

Jan 2001 - Dec 2001. Worked at home -

Sept 2001 Started home school. - Continued to be home until Dec. 2004.

1/1/2001 - Dec 2001 - Heard noise looked like they were walking & unloading inside yard.

Observed Trucks starting at in Mellon Ave

Observed Trucks being loaded on Mellon Ave.

Summer of 2002 - She was home for Scotland

3rd week of July - All of sight goes out of yard.

Only activity she observed were Darryl in his Grooms storing property. Shown once or twice a month storing property.

Fam Z.C. Having noticed she left she saw no activity - noticed 8/2004
Bd. Ex 17 - Photo showing property on 4/15/2004
Smith Zoning C. being she has been at 110 Mullen Ave. Noticed she left. Was there every day
Other than showing of property. Saw Dwyer with a couple of guys - 2x4" being pulled down for rafters. She could not see anything else in building
Hearing date - Started she left she saw Dwyer there in June or July -
Sold 110 Mullen - 8/30/04.

Cross Zimmerman
When she bought her property Dreamer did it & look like it was used much. Shortly after she moved in - noticed all trucks were ~~sheet~~ parked on the street
Had conversations regarding use of property
Trailer was put on property.
Home was nearly across the st. Parking on both sides of Mullen Ave. Single family home on West Side of Mullen. Army is on West Side of Property
No use after Dreamer property on East Side.

Cross Bernstein
Glenwood - between Frederick & Edmonson
1 Blk up to Frederick East to Glenwood
Left on Glenwood - 1/2 blk.
Cannot see Mullen Ave from her house.
Does not own any ~~other~~ property on Mullen.
Traffic generated by Darrel on Frederick by Darrel's trucks were disrupted.
2003 - Saw Darrel taking lumber out of garage
2001 - Went to law school - 2 days.
At law school 10 hours per week.

Gone between 10 to 2:00 p.m. Was taking walk at lunch for a few years.

2nd years worked for Tillotson. Took lunch play to people during between 7-9. At end of month.

Sales of Mullen Ave 8/30/04. Gallagher had moved.

Lewis Kubiet - 116 Mullen Ave. rented there since July 1977.

Went to St Marks School. Father transfer at Jr. High School. He went by subject property from 1950 to mid 1960's.

Present residence W/S Mullen Ave - South of subject property. Can see storage shed & yard.

As a child - City of Balto used property as storage yard for Water Mangt Trucks. Stored - stone etc. for filling in holes. Unknown until 1977 - Still used by City of Bal.

Pet. Ex 18 - Polaroid pictures for 1969. Shows property. Chain link fence & brown storage shed.

1980's City ceased using the property for storage. Kept trucks at property - left in running & cars back at night. 1986 - All activity ceased. Storage shed doors closed. No other property in sight. Box body of a truck was stored - A truck was stored on property.

Nicodemus - Contractor. Came on property in 1990. Leased Welding & Trimes truck. Did not come to facility every day. Some work in storage shed.

Nicodemus left in 1991.

Material in bins was left by city

Residence left. property sat vacant for 2 years. 1993 - Drennen started using property
1st activity - 1-2 3/4 T. pick up trucks.
Used yard for 2 trucks & storage of bobcat
Steady progression increasing storage of trucks.
Adopts Gologitti testimony

Drennen left site June of 2002.
1 piece of equipt - front end loader remained in yard. Removed early 2003.
He manages office in Belle Haven
Tues AT home 4 times per week & only for hours.
Since Drennen left. Piece of equipt left
Gate not locked until current owner came in.
Pet Ex. 19. Photo inside the storage yard. Taken 12/04.
Pet Ex 20 " Photo up at Dugan-Smith - rear of yard. to water
Pet Ex 21. Exterior of front line of property.
Pet Ex 22 - Other side of shed.
Actively in site in Dec 2004. Actively inside storage building. Saw no pick burning. Events 1st were before Drennen left

Cross Zeminerian.
Property zoned residential in 1950's.
Current zoning BH & DR 2.
His rec. no notice to change zoning
Doesn't know when property became BH & DR 2.

Cross Brunstein.
Appeared before H.O. in Lodi on front case
Gologitti, Amos also testified.
Prepared with counsel.
His home is not directly in front of the yard.

If gate is open he can see in.
Would not know if someone was in yard.
He can see into yard from his porch & Rooms of his home.
Trash trailer was removed sometime after Dennis stopped using the property in fall 2002
Storage shed was along there.
Last time he was in storage shed - late 1990's
Stored lumber, rebar, tools of trade
City stored a trash in that shed.
When he saw Dennis - seemed to be storing the property.
Just met Ordowski today.
Daughter at property since Dennis left.
Daughter still has material stacked out

Appellants. Odochowski
Wayne Ordowski - Cutting Partners
Real Estate Holding Dwight & Irma
Rentals Wash.
Rehabilitates & Rentals of Rental Property
Bought property April 2004.
Looked at property 6-9 months before.
Was a contractors yard. Box truck. Shed has concrete standards stored. Rebar, wood & safety fence.
He stores things in the shed.
Plans to use locally as contractors storage yard. Plans to store 3/4 ton pick up truck. Might store a bobcat.
No landscaping.
Another site where he stores equipment - Ocean City Jail. He stores rebar, fence, lumber, steel fence. - Aggregate kept now in bins. (Covered)

Cross
Zamman

He is land Dev. Had an realestate agent
~~Same~~ Knew there was a pending zoning case
Did it need decision.
Has checked to find out what zoning allows
for contract storage yard.

Cross Tungay - When he became aware of pending zoning
case - ~~After settle~~
Became aware of zoning matters when before
when he got in equipment
Darrel Hale lease land at the site.
He met with Darrel after zoning amendment
No rolling stock inside the yard after.
Aggregate.
Darrel had 10-20 tons of concrete.

Zamman re-

Issues. -
1. Whether Non Conf. Use. - exists.
2. Does Butler County use good fa
3. Did city's subsequent laws.
4.

P.C. # Zoning History

Briefs Jan 28, 2004.

Section 3-6-201

In addition to any other remedy authorized by law the County or the Code Official may enforce and seek correction of a violation as provided in this Table.

Section 5007.

Gives Z.C. power to determine the existence of any non-conforming use - after advertised & notice

Any interested person can request Z.C. to determine if there is one

Z.C. Should rely on non-conforming use to find no violation.

Hearing Z.C. is only one authorized to find a non-conforming use. At a time it was brought to him. He found no non-conforming use.

Standing —

Kennedy still lives on Mallow Ave & asked the prothonotary as parties to attend below

pl argue Z.C. decision stands unless reversed after a hearing. ~~P [illegible] standing~~ standing in admin hearing not as strict as in court - [illegible] of Dec

Entry may have had non-conforming use - found to Nordstrom business to in early 1990's 10/24/90 - 1 yr Nordstrom left property vacant until 12/1993 when Brennan leased property 6/2002 Brennan's Dissolved. Operations to spring - 2004

1. Nonconforming use was discontinued. If use was for storage of a truck & materials by the City. It ceased when property was used for storage of construction equipment.

2. Abandonment could lead to Nonconforming for storage of materials & work on equipment storage.

collateral estoppel

1. Res judicata does not apply.
Not same parties.

Mistaken interpretations of law See pg 127 of Tompkins Concl MPC Fam v Bally Kenny 279 Md. 29. Mistaken

Parties before Circ Court Enforcement Appeals were County & Dreamer. Appellants here were witnesses. Does not preclude the case filed with Z.C.
Collateral estoppel - same issue but not account

2. Petitioners do not lack standing. They were petitioners below & could continue dispute issuing among Lewis Kulicki moved to have a party before Board. Testified below. Lived in Walker Ave & can be party

3. Built for Z.C. has authority to determine Nonconforming use. Circ Enforcement does not. 500.7.

4. Use of Baltimore Co. property by Baltimore City does not exempt it from Baltimore County Regs
Pan American Health Org 338 Md 214.
State is not governed by its own enactments except to State of Md. & its instrumentalities not to all agencies of gov't
I Baltimore City subject to Zoning Regs.
it established a non conforming use.
until it lapsed to Nonuse.
Use was storage of a Utility truck & materials. Abandoned.
Nonuse lapse property in 1991
Property not used for 2 years until 1993
lease to Dreamer

5. Portions of brief raised for first time in Brief to Board..

Not ~~litigated~~. Will not be allowed.

(1)

Notes for Deliberation

Pltf Issues

1. Does Baltimore County Code Exempt Offend
(2) have authority to determine existence of non-conforming uses. No. Think that is reserved to Zoning Commissioner.

If so, does decision have preclusive effect res judicata or collateral estoppel
If not - Not res judicata.
a. Parties were different before Z.C.
County + Drummond
Not res judicata
b. Collateral estoppel - issues not fully litigated - Cases against H.O. during
See Board of County Commrs v. Rucin 24 Md App 435

(3) 2. Is area of Baltimore County
property by Baltimore City exempt from Balt Co. Zoning Reg.
No Pan American Health Org
338 Md 214. - State governed by its own enactments - refers to state of Md. + its instrumentalities - not all levels of govt.
Therefore Balt City established
Non conforming use - storing of utility trunk + materials
Lease to Newlons 10/24/1990 Carpenter shop + storing of materials
Newlons left in 1991 - New lease to Drummond - August 1993.
Over 1 years abandonment therefore
Kubert testified it was vacant for 2 years.
Estoppel not enough
Canada Taverns Inc v. Town of Colmar Manor 260 Md 206.

(1) 3. Petitioners burden of showing. Very liberal before Bd. Original petitions filed before H.O. Kubert's testimony below.

They are interested parties. Therefore they thing were allowed to participate before Board & have standing - been in Malden two just say from yard.

4. Doctrine of laches. - First raised in brief to Board. Not litigated cannot be allowed.

5. Specifically denied statement by Counsel for Petitioners that Mr. Shugrue's Decision was favorable to Appellants based on friendship of appellants attorney with Mr. Shugrue.

Proposed activity more than zoning non conforming use
See Phillips v. Zoning Board of Howard County
225 Md 102 (1961)

Calhoun v. County Board of Appeals of Baltimore County
262 Md. 245 (1971)

property out and from 2002 until May 2004

No Respondents or collateral estoppel
Not comparables -
Request providing location County
& Dennis - not parties to this case

McKenny v. Baltimore County 39 Md App 257 (1978)
See Tampa Brief pg 17-18

Appellate cases -
Bratsen v. Shipley 325 Md. 677 (1992) 602 A2 1191
86 Md App 340, 356.
A landowner does not acquire an interest
Steff v. Collins 289 Md 687 (1945)
207 A2 489.
Feldstein v. La Vale Zoning Board
246 Md 204 (1967)
227 A2 731
not patent - no 19 period
Kastendike v. Baltimore Area for Rational Utilization
267 Md 389 (1972)
297 A2 745
is utility subject to zoning
Pandemonium Health Group v. Montgomery County
Walstate when the State) Md 3 its instrumentalities - not the all levels) govt
338 Md 214 (1995)
651 A2 1163
State is not governed by its own enactments.
Mayor & City Council of Balto v. State 281 Md 217
378 A2 1326 (1977)
325 Md.
281 Md. 217
282 Md 641

12/22/04 Special Hearing

Appellant Odochowski, Owner / Ben Baumstein, Esq.
Protest Cigliotti & Amor - Protestants / Mike Tanczyn, Esq.
People Co. People Council - Pete Zimmerman, Esq.

Preliminary Matter:
Protestant - amor sold property - now owner property 2 blocks away.
Cigliotti - Sold property live in Parkville.
Brenner Sold property 4/04
Sec. 7 Zoning Reg.
Neighborhood protestant.
Appellant: Hearsay due to protestants not now owners.
New owner: not/should not be added.
Case against Property - Not owner.
B/Mayor 1123.5 small part. Mr Odochowski - Gateway
Non-practice
1- Authority of Shapiro Sec. 6 +7 Zoning Code Title #6
Heard case on two occasions - not be heard again.

Mr Zimmerman - Hearing Memo
1- General rule of vested interest by parties
Protest proper from area residence
2- Hearing officer may have right to decide
3- If Non-conforming use continue.

Hear case in sub-zonic. & odd conditions
32-3-

Pet. Exhibit #1 Zoning Map 13 M & - Current except 1 change - Not issue

Witness #1 M/s Cigliotti - Amor 7901 Tiomard Ave Parkville
108 Hunter Ave 99-03
use of Miller Ave - Store trucks. 2001 - activity increase
in size & frequency of use. More noise, traffic.
Keep log of use to record time of use 5 hrs + increase noise level
more employees & activity.

12/22/09 Page #2 Millar Ave

Tech Photo's Exhibit 11- 12 A-D showing parking & other activity.

Board Exhibit #2-A Photo Review 2002

" 2-B " " "

" 3-(A-D) " 1999

" 4-(A-P) 2001 Truck activity Storage Trailer

5-(A-F) 2002 - Office Trailer, Water line installed

6-(A-F) Fall 2002 use of land not conf.

7-(A-E) Summer 2003 after Brennan left photo Zoning Sign & For Sale Sign.

moved 12/03 Property not used since

Title research - req. Owner req. Zoning change Franklin Realty 11/9/ & 9/18/54

Exhibit #8 - never refused. Zoned as Residential

Exhibit #9 - lease to Balt. City & Nicodemus Const.

" 10 - lease to Brennan 8/1/93

" 11 - Property sale by City to Brennan 2002

IPONLY - 12 - Deed 5/19/54 sold portion to Military

13 (A-C) Photo's showing prop. after vacated by Brennan

14 - Photo 95? shows existing Trees.

15 - Letter from Mayley office showing lease history

16 - MLS listing for Sale

Zimmerman

familiar with property in Catonsville 1988 Purchased 7/1/99

Use of Prop. as an street - storage of Trucks.

Operation suspended shortly after she moved into her home.

6/02 operation ended Brennan Const. & eq. up moved & left Vacant 18 mo.

Research proved Bus/Mfg & Res. Residential

Still Vacant for over 2 years.

Mr Brantin

Replaced fence & front of garage - More pleasing appearance.

Vacant - Sure? Storage Bus - Yes Garage - Closed

Worked 8-5:30 ~~out~~ Could Not observe daily activity

Belmont Ave in Parkville 2 mile from prop.

No interest in previous property

Nat'l Board down street

Page #3 Mellor avenue
Not'l Guard personell in once - yer.
other properties Block Commercial property
on her side all residential
Traffic same + or less on her street.

Witness # 2 M/S Linda Amor.
Moved to another area of Catonsville
Live on Mellor Ave. oct 2000 - 2004
Helped gather info w/ Mr Johnson.
Worked in D.C. 9-7 In a CPA 1/01 - 12/01 worked at home.
Observed at 111 Mellor Ave increase in noise & other activity Interrupted Traffic due to repair + loading + unloading Trucks.
Level of activity decreased in 7/02 Since then Property not used. Tried to sell 2003 - till 8/03 no activity
Exhibit #17 Photo that property appear vacant. ~~one~~
Zoning Hearing in 2003 activity was vacant 7+12/2003 property which was for sale.
Sold her home. aug 30, 2004

Zimmerman
Change in use of Kramer Prop. Not used much when they moved in but increased activity. Knew Howell Kramer.
+ discussed issue with ~~truck~~ Cars parking in front of her home.
Trailer on property 2001
Her home directly across street of Kramer Prop.
Two way traffic, parking both sides. 3-4 Blocks of homes
Property Weeded Panther down street

Bromstein
Still have concern with traffic on Mellor Ave even though she moved from there to a neighboring Street.
2003 saw owner "Howell" taking lumber from garage.
Ved Law School 10 Hrs wk 9-4

Page #3 Mellon Avenue
Worked at home 2003 part time work
Street ~~Bet~~ Glenwood Ave - S/F Homes Residential
Traffic Zero
Sold 8/04

Witness #3 Mr Lewis Tubert Mgr. Tax Revenue Service 7/77 owned
Resident near Site Went to School
L West side on Mellon Property.
use by City of Bolt - Storage of Trucks. Bench stored Stall
for Tile
Same in 77

Exhibit #18 Photo 6/69
Mid 1980 City leased use limited activity til 86
& No longer Used Storage
1990-91 Niedman - contractor - used property as storage
Not daily visits & some work on site
1991 - Sat vacant for 2 yrs.
1993 - Brunner Concrete "DENNIS" used site at first late use
activity increased
~~Tel~~ June of 2002 Brunner left site - Moved equipment of site
except Front end Loader Earlier 2003 it was moved.
Made some improvements Fence & shed.
Some ~~days~~ days he works at Home 6:45 - 4:45 Full day work.
Some material & Equip. has been moved from Property.
Gate Not Locked till property Sold
Exhibit #19 - Show site interior
#20 - Photo Current 12/04
#21 - 12/15/04 Photo Storage Shed
#22 - Photo 04 Photo "
Activity - Little - Now
#23 - Property. To New Owner at 110 Mellon Ave,
Farmer man
Forty year resident
Current Zoning

Mr Bernstein

~~Appeal~~ Appeared before Zoning Officer.

Nervous testimony w/ ~~counsel~~ counsel.

~~Their Their~~ Their home is 2 houses south of 111 Mellor Ave.

City Trust moved after 6/02

Bath house removed 1/03 latest.

Reconsider Full for Open.

~~Witness #4~~

Mr Bernstein 108 + 110

Appel Exhibit #1 + 2 New Owner of Mellor Ave.

Witness #1 Wayne Odachowski - Gateway Properties

W/E Investment Rehab Work

4/04 Bought Property Contractor Yard w/ Storage.

Use as Storage Continue use to store material +

Some Equipment

Property Not Secure all the time

Zimmerman Exhibit #1 - Zoning History

Bought 4/04 Mgr Partner of Gateway

aware of Zoning 12/2003 Decision

Year Not Understand this hearing

ask req zoning use.

B/M use

Mike Tamczyn

Aware of Zoning during contract. Conflict with community

Did have equip. on site

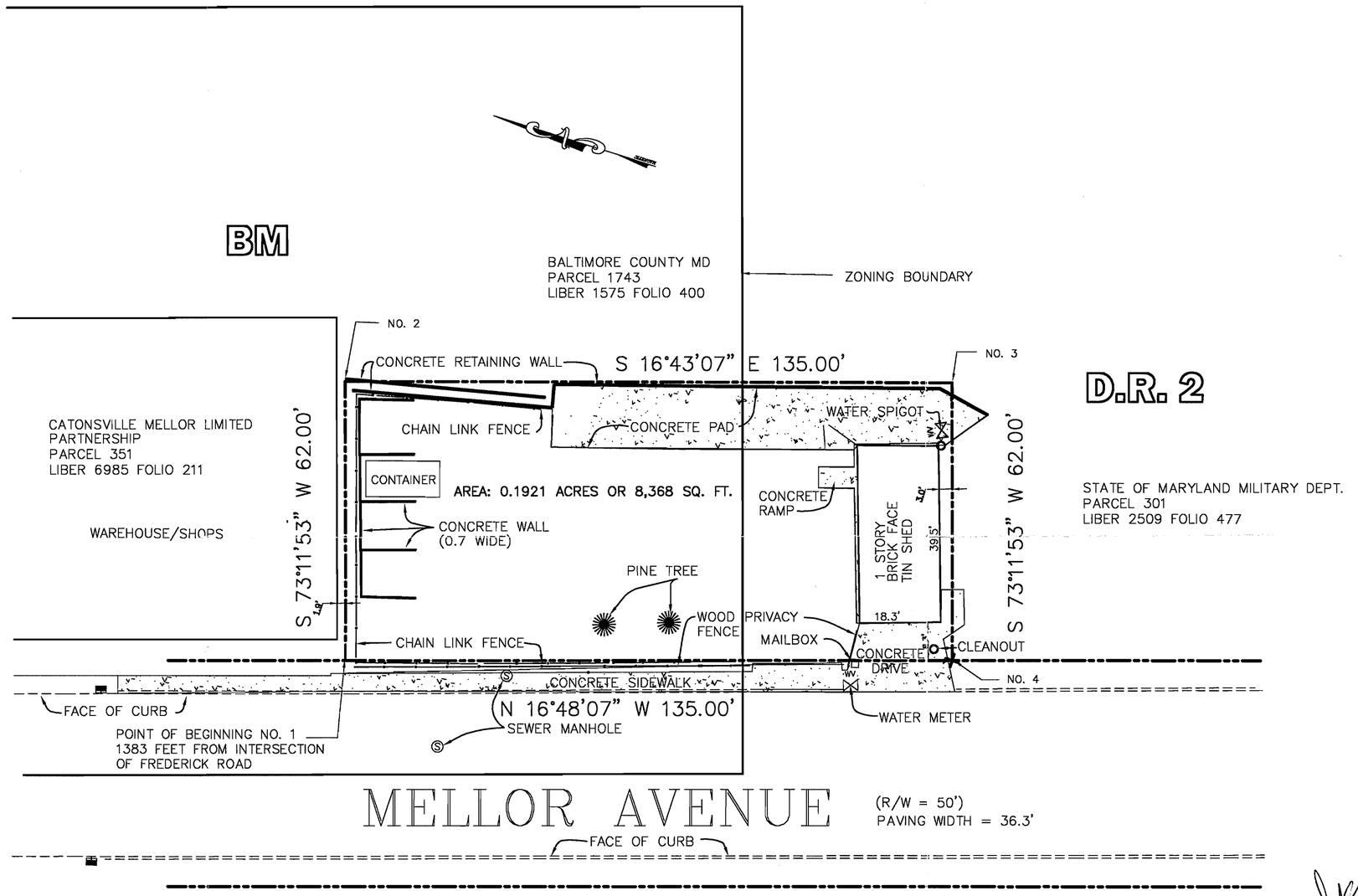
No Stock on site.

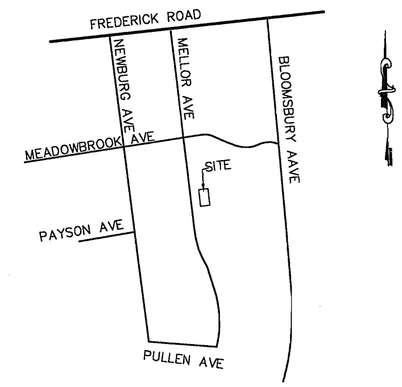
Brief Request. due 1/28/05

PLAT TO ACCOMPANY PETITION FOR ZONING ☐ VARIANCE ☒ SPECIAL HEARING

PROPERTY ADDRESS: 111 MELLOR AVENUE
CATONSVILLE, MARYLAND 21228

RECORDED IN LIBER 14361 AT FOLIO 556
OWNER: D A DRENNER CONCRETE INC.





VICINITY MAP
SCALE: 1"=1000'

LOCATION INFORMATION

ELECTION DISTRICT: 1

COUNCILMATIC DISTRICT: 1

1"=200' SCALE MAP # SW 3 F / 101A2

ZONING: D.R. 2 & BM

PARCEL SIZE: 0.1921 ACREAGE 8,368 SQUARE FEET

	PUBLIC	PRIVATE
SEWER	☒	☐
WATER	☒	☐

	YES	NO
CHESAPEAKE BAY CRITICAL AREA	☐	☒
100 YEAR FLOOD PLAIN	☐	☒
HISTORIC PROPERTY/ BUILDING	☐	☒

PRIOR ZONING HEARING JAN.13,1954 #2800

PREPARED BY: **MARKS & ASSOCIATES L.L.C.**
4531 COLLEGE AVENUE
ELLICOTT CITY, MARYLAND 21043
PH. (410) 747-8738
FAX (410) 747-8739

SCALE OF DRAWING: 1"= 20'

DATE: DECEMBER 13, 2002

Pet No 6

ZONING OFFICE USE ONLY

REVIEWED BY	ITEM#	CASE#
JNP	456	03-456-SPH

IN RE: PETITION FOR SPECIAL HEARING NE/S Mellor Avenue, 1,383' S of the c/l Frederick Road **(111 Mellor Avenue)** 1st Election District 1st Council District D. A. Drenner Concrete, Inc., Owners; Linda J. Amos and Susanne Gigliotti, Petitioners	* * * * * *	BEFORE THE ZONING COMMISSIONER OF BALTIMORE COUNTY Case No. 03-456-SPH

* * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing filed by Linda J. Amos and Susanne Gigliotti, through their attorney Michael P. Tanczyn, Esquire, relative to the subject property, which is owned by D. A. Drenner Concrete, Inc. The Petitioners request a special hearing seeking a determination as to the following: 1) Whether the subject property enjoys a valid, nonconforming use status as a contractor's equipment storage yard; 2) whether Baltimore City's use of the property constitutes an activity which makes the property exempt from the Baltimore County Zoning Regulations (B.C.Z.R.) while so utilized; 3) whether Baltimore City's subsequent lease of the property is a proprietary function for remuneration, making the property subject to the B.C.Z.R. beginning with the lease term; and, 4) whether the Zoning Commissioner/Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a nonconforming use. The subject property and requested relief are more particularly described herein and on the site plan submitted into evidence as Petitioner's Exhibit 6.

Appearing at the requisite public hearing on behalf of the property owners were Dennis A. Drenner and Darrell Drenner, representatives of D. A. Drenner Concrete, Inc., and their attorney, Benjamin Bronstein, Esquire. Susanne Gigliotti and Linda Amos appeared in support of the Petition, along with their attorney, Michael P. Tanczyn, Esquire. Also appearing in support of

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By

the Petition were Shirley Marr, Stephen Amos, Lewis L. and Cindy S. Kibiet, James B. Bossert, and James Jett, all residents of Mellor Avenue.

The Petition for Special Hearing was filed, pursuant to Section 500.7 of the B.C.Z.R. That Section authorizes the Zoning Commissioner to conduct such hearings and pass such Orders as may be necessary for the proper enforcement of the zoning regulations. Section 500.7 also allows any interested person to Petition the Zoning Commissioner for a public hearing to determine any rights whatsoever of such person and any property in Baltimore County. Although most Petitions considered by the Zoning Commissioner are filed by the property owner, Section 500.7 allows adjacent property owners/interested persons to seek a public hearing to determine the propriety of a given use and/or the application of a zoning regulation to a specific property. Thus, the subject Petition is properly filed, pursuant to that Section.

Testimony was received from both sides regarding the history and ongoing use of the subject property. Additionally, numerous documents and exhibits were offered at the hearing, all of which established the factual background to this case, which was largely undisputed. In this regard, the subject property is a rectangular shaped parcel located on the west side of Mellor Avenue, just south of its intersection with Frederick Road in Catonsville. The property contains a gross area of 0.1921 acres, more or less, approximately 2/3 of which is zoned B.M., with the remaining 1/3 zoned D.R.2. Improvements on the property include a one-story tin shed, 18' x 40' in dimension, which is located in the southern, D.R.2 zoned portion of the site, and a container is located in the northern portion of the site, which is zoned B.M. Additionally, there is a concrete retaining wall and long concrete pad along the rear of the property, which cross the zone line, and there are several concrete parking bays along the northern property line. The remaining area of the property is unimproved. The property is enclosed with a combination chain link fence and wood privacy fence.

The City of Baltimore originally owned the subject property from approximately 1925 (see Property Owner Exhibit 4) until March 2000. For many years, the property was used as a maintenance yard to house the Baltimore City Water Department utility trucks. The site also

contained several outdoor buildings and at least one concrete bin. Apparently, the City used the property with varying degrees of intensity until the late 1980s. In approximately 1987/1988, the City generally stopped using the property on any active basis and removed existing materials from the site. On or about October 24, 1990, the City leased the property to Nicodemus Construction Company and the property was thereafter used by that entity for several years as a carpentry shop and to store materials. The Nicodemus Construction Company eventually vacated the site and on December 3, 1993, the current property owners, D. A. Drenner Concrete, Inc., executed a lease with Baltimore City to use the property as an office and for storage of materials. This lease continued until March 2000, at which time the City sold the property to D. A. Drenner Concrete, Inc. for $12,500.

There was voluminous testimony and evidence offered by the Petitioners regarding the use of the property. It is clear from this record that the activity on the property was relatively modest in terms of scope and impact to the neighborhood when owned by the City. Moreover, it appears that there was a period of 1 or 2 years when the City discontinued the use of the site until the property was again actively used under the lease with Nicodemus Construction Company. In addition, it appears that the activity during the term of the Nicodemus lease was minimal. Although some materials were stored on the site, most of the activity on the property by Nidocemus was within the building.

Since 1993, the nature of the use on the property by the D. A. Drenner Concrete, Inc. has varied. Initially, Drenner mainly used the property for storage; however, in the mid to late 1990s, the activity significantly increased. Testimony and evidence offered by the Petitioners demonstrated that there was significant activity by Drenner for several years. Ultimately, approximately one year ago, Drenner vacated the property. Apparently, they have obtained another site from which the business is operated.

Coincidental with the increased activity on the site by the Drenner Company in the late 1990s, the Petitioners/neighbors took interest in the site. Testimony and evidence indicated that the activity on the property caused noise, dust and traffic in the area to the extent that the neighbors

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Date 9/30/03
By

filed a complaint with Baltimore County. As a result of that complaint, there have been at least four code violation citations issued for the property and hearings conducted in those matters under Cases Nos. 98-2180, 99-6305, 00-0836 and 00-1503. The nature of these alleged violations was that the property was being used as a contractor's equipment storage yard, which is not a permitted use in the B.M./D.R.2 zone.

Copies of two of the decisions rendered in those cases by the Hearing Officer for the Department of Permits and Development Management were offered at the hearing. In Case No. 98-2180, Code Violation Hearing Officer Stanley J. Shapiro dismissed the citation. In his written decision, he stated, "I am persuaded that the subject property has been used as a contractor's or construction equipment storage yard since at least 1938 and quite possibly before 1938." He also noted that Section 104 of the B.C.Z.R. permits the continuation of a nonconforming use. A nonconforming use is defined in Section 101 of the B.C.Z.R. as "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such use." In essence, Hearing Officer Shapiro opined that the use of the property was nonconforming and that there was no violation.

A similar result was reached in Case No. 00-1503. In that matter, similar citations were issued regarding the use of the property. Following a public hearing, Hearing Officer Stanley Shapiro noted again that the property had been used by Baltimore City for the storage of heavy equipment and material used to maintain water and sewer service in Baltimore County. Hearing Officer Shapiro also noted the doctrine of res judicata or claim preclusion. These doctrines prohibit additional litigation when the identical issue had previously been litigated between the same parties. He opined that the citation issued in Case No. 00-1503 must be dismissed because "Baltimore County is precluded from prosecuting this matter by the doctrine of res judicata."

As noted above, the Petition for Special Hearing seeks a determination of four issues. Additionally, following the hearing, Counsel for both parties submitted written memoranda on the issues presented. Within the Petitioner's Memorandum, the four issues were restyled and presented as three matters for resolution. Within its Memorandum, Counsel for the Property

Owners presented a four-pronged argument in opposition to the Petitioner's contentions. These well-written memoranda are self-explanatory and have been reviewed and considered by the undersigned Zoning Commissioner and the following analysis results.

ISSUE No. 1 – The Baltimore County Code Enforcement Official lacks the authority to determine the existence of a nonconforming use.

Baltimore County is a Charter County, pursuant to the provisions of Article 25A of the Annotated Code of Maryland. The Charter was adopted by the voters of Baltimore County on November 6, 1956. The Charter establishes the structure of County government and Section 522 thereof establishes the Office of the Zoning Commissioner.

The authority of the Zoning Commissioner is set forth in the Baltimore County Code. Section 26-3 thereof sets out the method of appointment of the Zoning Commissioner. Section 26-127 provides for the authority of the Zoning Commissioner. It is also to be noted that Section 26-121 of the Code establishes the process for zoning violations. That Section also provides that the Director of the Department of Permits and Development Management shall interpret and enforce the County's zoning regulations. Indeed, Hearing Officer Shapiro's office and authority is founded upon that Section. The B.C.Z.R. also established the authority of the Office of the Zoning Commissioner. Section 500.7 thereof specifically authorizes the Zoning Commissioner, "To determine the existence of any purported nonconforming use on any premises."

These authorities are all persuasive to a finding that the Zoning Commissioner is the sole public official who may determine the existence of a nonconforming use. Arguably, for the purposes of civil code enforcement, the Code Violation Hearing Officer dismissed a violation because he "believed" that a nonconforming use existed. However, that ultimate finding is exclusively reserved to the Office of the Zoning Commissioner.

Having found that the Zoning Commissioner alone has the authority to designate and determine a nonconforming use, it easily follows that the prior decisions made in Cases Nos. 98-2180, 99-6305, 00-0836 and 00-1503 do not therefore trigger the application of the doctrine of res judicata or issue preclusion. Hearing Officer Shapiro had no authority to issue such a ruling.

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Date 9/20/13
By

Moreover, it is well settled that the doctrine of res judicata/issue preclusion is sparingly applied to decisions of administrative bodies (See e.g., Board of County Commissioners of Cecil Co. v. Racine, 24 Md. App. 435 (1975). For reasons that follow, it is clear that Hearing Officer Shapiro incorrectly applied the law in reaching his conclusion.

ISSUE No. 2 – Is/Was the use of the property as a contractor's equipment/construction equipment storage yard nonconforming?

As noted above, nonconforming uses are defined in Section 101 of the B.C.Z.R. and regulated in Section 104 thereof. Nonconforming uses are not favored at law (see McKemy v. Baltimore County, 39 Md. App. 257 (1978). Nonconforming uses are frequently utilized to grandfather an otherwise illegal use. Nonetheless, in that nonconforming uses are considered inconsistent with the scheme and intent of the zoning ordinance, they may be lost due to an abandonment or discontinuance.

More importantly, the testimony and evidence set forth above noted that the subject property was owned and used by Baltimore City for many years, from approximately 1925 until 1990. During that time, the B.C.Z.R. were inapplicable to this property. It is well settled that a municipality is not subject to the zoning ordinance. (See Mayor and City Council of Baltimore v. State, 281 Md. 217 (1977) and Board of Child Care of Baltimore Annual Conference of the Methodist Church v. Harker, 316 Md. 683 (1989). Following the holding of these cases, it is clear that the Baltimore County Zoning Regulations were not applicable to this site during the period of time that the property was used and owned by Baltimore City. The use ongoing at that time was not nonconforming in that the B.C.Z.R., including Sections 101 and 104, were not applicable. Only when the City ceased use of the site in 1990 did the B.C.Z.R. attach and become applicable to this property. Moreover, there was a period of 1 or 2 years when the City discontinued the use of the site until the property was again actively used under the lease with Nicodemus Construction Company. Thus, it is clear that the use of the property as a contractor's equipment storage yard is therefore not nonconforming.

PLEASE RETURN TO
9/30/03

CONCLUSION: Based upon the foregoing, it is clear that the Petition for Special Hearing must be granted. The subject property is not insulated as a nonconforming use in that a) Mr. Shapiro had no authority to grant such approval; and b) the testimony and evidence presented is not persuasive that the use of the property is nonconforming, as defined in Section 101 of the B.C.Z.R. Thus, the property is subject to compliance with all relevant regulations of the B.M. and D.R. 2 zone.

Pursuant to the advertisement, posting of the subject property and public hearing on this Petition held, and for the reasons set forth herein the relief requested is hereby granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 30th day of September, 2003 that, **1)** the subject property does not enjoy a valid, nonconforming use status as a contractor's equipment storage yard; **2)** that Baltimore City's use of the property did constitute an activity which made the property exempt from the Baltimore County Zoning Regulations (B.C.Z.R.) while so utilized; **3)** that Baltimore City's subsequent lease of the property is a proprietary function for remuneration, which made the property subject to the B.C.Z.R. beginning with the lease term; and, **4)** that the Zoning Commissioner/Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a nonconforming use, and as such, the Petition for Special Hearing be and is hereby GRANTED.

IT IS FURTHER ORDERED that any appeal of this decision must be entered within thirty (30) days of the date hereof.

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

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By

IN THE MATTER OF THE APPLICATION OF LINDA AMOS AND SUSANNE GIGLIOTTI - PETITIONERS; 111 MELLOR AVENUE PROPERTY FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE NE/S MELLOR AVENUE, 1,383' S OF C/L OF FREDERICK ROAD 1ST ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	* * * * * * *	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 03-456-SPH

* * * * * * * * *

OPINION

This is an appeal from a decision of the Zoning Commissioner in which the Zoning Commissioner granted relief requested in a Petition for Special Hearing.

The hearing before the Board took place on December 22, 2004. Petitioners, Linda Amos, Susanne Gigliotti, and Lewis and Cindy Kubiet, were represented by Michael P. Tanczyn, Esquire. The Kubiets were allowed to participate as parties at the hearing before the Board although they only testified as witnesses below. They live on Mellor Avenue, near the property in question. Between the Zoning Commissioner's hearing and the hearing before the Board, Ms. Amos and Ms. Gigliotti moved away from Mellor Avenue. The Appellant /Respondent was represented by Benjamin Bronstein, Esquire. The amendment of the Petition to include the Kubiets was contested by Counsel for the Appellant /Respondent, Drenner Concrete /Purchaser-Legal Owner, Wayne Odochowski.

Facts

The testimony indicated that the property in question is located on the east side of Mellor Avenue in Catonsville, just south of the intersection of Mellor Avenue and Frederick Road. The property is rectangular in shape, about 60 feet by 355 feet, and is approximately .5 acre in size. It is zoned B.M. with a small remaining portion of the property zoned D.R. 2.

Improvements on the property include a one-story tin shed, 18 feet by 40 feet in dimension which is located in the southern D.R. 2 portion of the site. A container is located in the northern portion of the site which is zoned B.M. Additionally, there is a concrete retaining wall and a long concrete pad along the rear of the property which crosses the zone line, and there are several concrete parking bays along the northern property line. The remaining area of the property is unimproved. The property is enclosed with

a combination chain-link and wood property fence.

The City of Baltimore originally owned the subject property from approximately 1925 until March of 2000. The property was used by the City as a maintenance yard to house a Baltimore City Water Department utility truck. Testimony revealed that in approximately the late 1980s the City generally stopped using the property and removed the existing materials from the site. On October 24, 1990, the City leased the property to Nicodemus Construction Company for use as a carpentry shop and for the storage of materials. It appeared that most of the activity on the site under Nicodemus took place in the shop with very little if any outdoor storage of materials. After approximately one year, Nicodemus vacated the site, and the site remained vacant until December 1993, when D.A. Drenner Concrete, Inc., began to use the property under a lease made with the City of Baltimore on August 3, 1993.

Testimony indicated that Drenner initially used the property for storage; however, in the mid to late 1990s, activities significantly increased. That activity included large trucks and heavy equipment being operated with back-up alarms early in the morning and late at night, and with welding activities conducted on the streets and heavy equipment being brought to the site and stored by Drenner. In the Spring of 2002, Drenner began moving its equipment out of the property, and by June 2002 it had vacated the property. The property remained vacant until the Spring of 2004 at which time it was sold by deed dated May 20, 2004 to Gateway Partners, which is owned by Wayne Odochowski. He now seeks to overturn the decision of the Zoning Commissioner.

Coincidental with the increased activity on the site by Drenner Concrete in the late 1990s, the Petitioners, who were neighbors, filed a complaint with Baltimore County as the result of the increased noise and dust raised by the operation of Drenner. As a result of that complaint, there have been at least four Code violation citations issued for the property and hearings conducted in those matters under Case Nos. 98-2180, 99-6305, 00-0836, and 00-1503. The nature of these alleged violations was that the property was being used as a contractor's equipment storage yard, which was not a permitted use in the B.M./D.R. 2 zone.

Copies of two decisions rendered in those cases by the Hearing Officer for the Department of

Permits & Development Management were offered at the hearing. In Case No. 98-2180, Code Violation Hearing Officer Stanley J. Schapiro dismissed the citation. In his written decision, he stated, "I am persuaded that the subject property has been used as a contractor's or construction equipment storage lot since at least 1938, and quite possibly before 1938." He also noted that § 104 of the *Baltimore County Zoning Regulations* (BCZR) permits the continuation of a nonconforming use. A nonconforming use is defined in BCZR § 101 as a "legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such use." The Hearing Officer held that the property was a nonconforming use and there was no violation.

A similar result was reached in Case No. 00-1503. In that matter, similar citations were issued regarding use of the property. Following a public hearing, the Hearing Officer Stanley Schapiro noted again that the property had been used by Baltimore City for the storage of heavy equipment and material used to maintain water and sewer service in Baltimore County. Hearing Officer Schapiro also noted the doctrine of *res judicata* or Claim Preclusion. These doctrines prohibit additional litigation when the identical issue had previously been litigated between the same parties. He opined that the citation issued in Case No. 00-1503 must be dismissed because, "Baltimore County is precluded from prosecuting this matter by the Doctrine of *Res Judicata*."

Issues

The instant case raises four issues which must be determined by the Board.

1. Do the Petitioners, Linda Amos, Susanne Gigliotti, and Lewis and Cindy Kubiet, have standing to pursue the petition before the Board or must the petition be dismissed?

2. Does the Baltimore County Code Enforcement Official have the authority to determine the existence of a nonconforming use, and, if so, does his decision have preclusive (or *res judicata*) effect on a Petition for Special Hearing?

3. Was there ever any nonconforming use on the property, and, if so, has it been terminated by change or discontinuance under § BCZR 104?

4. Does the Doctrine of Latches prohibit the Petitioners from pursuing their Petition for Special Hearing?

Decision

Issue No. 1: Do the Petitioners, Linda Amos, Susanne Gigliotti, and Lewis and Cindy Kubiet, have standing to pursue the petition before the Board or must the petition be dismissed?

The testimony revealed that, since the Hearing Officer's decision, Linda Amos has moved several blocks away from Mellor Avenue to the other side of Frederick Road, and Susanne Gigliotti Johnson has moved to Parkville. Lewis and Cindy Kubiet still live on Mellor Avenue and participated in the proceedings below but were not original Petitioners. The Kubiets asked for and were granted leave to become parties during the hearing before the Board.

While the hearing before the Board is a *de novo* hearing under County Charter § 603, the Board's jurisdictions is still appellate. Therefore, regardless of who may be interested at this point, the Zoning Commissioner has made a determination which stands unless reversed after hearing. [See *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 71-75 (2003).] It is clear that anyone who expresses an interest in an administrative hearing thereby becomes a party, unless excluded by valid statute or regulation. The standard is different from, and more relaxed than, the "standing" principle applicable in the courts. Quoting his own opinion in *Sugarloaf Citizens v. M.D.E.*, 344 Md. 271 at 286-87, Judge Eldrich wrote in *Dorsey*:

> The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily. In holding that a particular individual was properly a party at an administrative hearing, Judge J. Dudley Digges for the Court in *Morris v. Howard Res. & Dev. Corp*....explained as follows:
>
> > "He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should be not approved. This is far greater participation than that previously determined sufficient to establish one as a party before an administrative agency...."

Linda Amos still lives close enough to be affected differently from the public in general. She testified that the impact of the use on Frederick Road traffic in her neighborhood, ½ block from her house, is a particular problem. Lewis and Cindy Kubiet, although not original petitioners, participated at the Zoning Commissioner level. They were allowed to become parties before the Board. Mr. Kubiet

testified before the Board as to the history of the property and the annoyance which emanated from the property after the Drenner Concrete operation took over the property.

The Board affirms its position of granting the Kubiets Petitioner status and of continuing to allow Ms. Amos and Ms. Gigliotti to have Petitioner status in this matter.

Issue No. 2: Does the Baltimore County Code Enforcement Official have the authority to determine the existence of a nonconforming use, and, if so, does his decision have preclusive (or *res judicata*) effect on a Petition for Special Hearing?

Appellant /Respondent argues that the two decisions by the Code Enforcement Officer in Cases No. 98-2180 and Case No. 00-1503 were dispositive of this matter in that the Code Enforcement Officer found that there was a nonconforming use at the property and that the Petitioners were precluded by the Doctrine of *Res Judicata* or Collateral Estoppel from pursuing the matter further through a Petition for Special Hearing.

The Board rejects the contention that *res judicata* or collateral estoppel bars the Petition for Special Hearing in this matter. First, the hearing before the Code Enforcement Officer involved the County versus Drenner Concrete. The parties were not the same as those parties before the Board in the current Petition.

Second, §§ 500.6 and 500.7 of the *Baltimore County Zoning Regulations* (BCZR) give the Zoning Commissioner the power to conduct hearings involving any violation or alleged violation or noncompliance with any zoning regulations or the proper interpretation thereof. Section 500.7 states:

> The said zoning commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the county board of appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the zoning commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.

While the Appellant /Respondent contends that the Code Enforcement Officer had the right to determine the nonconforming use on the property, it is the position of this Board that that authority lies only with the Zoning Commissioner in accordance with § 500.7 of the BCZR.

However, even if the Code Enforcement Officer had the authority to determine the nonconforming use, he did not have all the facts before him or did not consider all the facts with respect to a nonconforming use as set forth below.

Issue No. 3: Was there ever any nonconforming use on the property, and, if so, has it been terminated by change or discontinuance under § BCZR 104?

Nonconforming uses are defined in BCZR § 101 as follows:

> A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

BCZR § 104 governs these uses and states in pertinent part:

> A nonconforming use (as defined in § 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.

In this Board's opinion, the language is clear that, regardless of the intent of the parties, if the use is abandoned or discontinued for a period of one year or more, the nonconforming use is lost. [See *Canada Tavern, Inc., v. Town of Glen Echo*, 260 Md. 206, 271 A.2d 664 (1970).]

Even if Baltimore City were exempt from the zoning laws of Baltimore County, which this Board does not believe is the case, the evidence is clear that the property was abandoned on several occasions for a period in excess of one year. Thus, according to the testimony of Mr. Kubiet, Nicodemus Company left the property in 1991 and the property sat empty until 1993 when it was leased to Drenner Concrete. The property then sat empty once more when Drenner left the property, and it was over one year until it was purchased by the current owner, Gateway Partners, LLC, and Wayne Odochowski, the principal owner.

In addition, the Board considers that the City of Baltimore was not exempt from the *Baltimore County Zoning Regulations*. The Board is persuaded by the argument set forth by People's Counsel in its brief in which it cites the case of the *City of Annapolis v. Anne Arundel County*, 271 Md. 265 (1974). In that case, the Court held that the County was subject to the Annapolis Historic District zoning ordinance.

The case turned on the interpretation of the "historic area zoning" ordinance passed by the General Assembly, which enabled counties and municipal corporations to establish historic districts and structural controls. Judge Barnes stated at 271 Md. 289:

> This court has held, however, that a county can be subject to the reasonable police regulations of an incorporated municipality.

We have been given no legal citations which would lead us to a contrary opinion. In American *Health Organization v. Montgomery Co.*, cited by the Appellants, the Court stated that a State is not governed by its own enactments. This case refers to the State of Maryland and its instrumentalities and does not refer to all levels of government. However, even if Baltimore City were exempt from the *Baltimore County Zoning Regulations* as a municipality, it lost that exemption when it leased the property to Nicodemus Construction Company in the early 1990s. Even though it might have been City property, the use by Nicodemus was not City business but was a private construction company operating on the property. Even that changed the operation of the property from the storage of a utility truck by the City to the operation of a construction company on the site. This alone would appear to cause the loss of the nonconforming use.

In any event, the Hearing Officer did not cite any of these conditions in either of the two hearing decisions cited by the Appellants in this matter. Therefore, the Board considers that this was a mistake in interpretation of the law. As cited by the Court of Special Appeals in *Board of County Commissioners of Cecil County v. Racine*, 24 Md.App. 435, 332 A.2d 306 (1975), "Mistaken interpretations of law, however honestly arrived at, are held not to be within the exercise of sound administrative discretion and the legislative prerogative, but to be arbitrary and illegal. Perpetration of illegality by an administrative but inflexible application of the principle of res judicata is impermissible." Thus, the Board does not consider that the Code Enforcement Officer's finding of a nonconforming use was a valid exercise of the Doctrine of *Res Judicata* or Collateral Estoppel.

Issue No. 4: Does the Doctrine of Latches prohibit the Petitioners from pursuing their Petition for Special Hearing?

Since the issue of latches was never raised either with the Zoning Commissioner below or with

the Board during the hearing in this matter, but was first raised by the Appellant in its brief, the Board declines to rule on the issue of latches in this matter.

ORDER

THEREFORE, IT IS THIS ____26th____ day of __ April_____, 2005 by the County Board of Appeals of Baltimore County

ORDERED:

1. That Linda Amos, Susan Gigliotti, and Lewis and Cindy Kubiet are eligible to maintain their status as Petitioners in the instant matter;
2. The subject property does not enjoy a valid, nonconforming use status as a contractor's equipment storage yard;
3. That Baltimore City's use of the property did not constitute an activity which made the property exempt from the *Baltimore County Zoning Regulations* (BCZR) while so utilized;
4. That even assuming that Baltimore City was exempt from *the Baltimore County Zoning Regulations*, the subsequent lease of the property is a proprietary function for remuneration, which made the property subject to the BCZR beginning with the lease term; and
5. That the Zoning Commissioner /Deputy Zoning Commissioner has the exclusive authority, pursuant to the Baltimore County Charter, to interpret the zoning regulations and decide whether the property is entitled to an Order finding a nonconforming use; and it is further

ORDERED that the Petition for Special Hearing filed by Petitioners /Protestants in Case No. 03-456-SPH be and the same is hereby **GRANTED.**

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

_____
Lawrence S. Wescott, Panel Chair

_____
Margaret Brassil, Ph.D.

_____
John P. Quinn

Zoning Commissioner

Suite 405, County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
Tel: 410-887-3868 • Fax: 410-887-3468

Baltimore County

James T. Smith, Jr., County Executive
Lawrence E. Schmidt, Zoning Commissioner

September 30, 2003

Michael P. Tanczyn, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204

RE: PETITION FOR SPECIAL HEARING
NE/S Mellor Avenue, 1,383' S of the c/l Frederick Road
(111 Mellor Avenue)
1st Election District -- 1st Council District
D. A. Drenner Concrete, Inc., Owners; Linda J. Amos & Susanne Gigliotti - Petitioners
Case No. 03-456-SPH

Dear Mr. Tanczyn:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petition for Special Hearing has been granted, in accordance with the attached Order.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Department of Permits and Development Management office at 887-3391.

Very truly yours,

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

cc: Benjamin Bronstein, Esquire, 29 W. Susquehanna Avenue, Towson, Md. 21204
Mr. Dennis A. Drenner, 13900 Kennard Drive, Glenelg, Md. 21737
Mr. Darrel Drenner, 8501 Delly Hyde Road, Union Bridge, Md. 21791
Ms. Susanne Gigliotti, 108 Mellor Avenue, Catonsville, Md. 21228
Mr. & Mrs. Stephen Amos, 110 Mellor Avenue, Catonsville, Md. 21228
Ms. Shirley Marr, 100 Mellor Avenue, Catonsville, Md. 21228
Mr. & Mrs. Lewis L. Kibiet, 116 Mellor Avenue, Catonsville, Md. 21228
Mr. James B. Bossert, 88 Mellor Avenue, Catonsville, Md. 21228
Mr. James Jett, 106 Mellor Avenue, Catonsville, Md. 21228
Code Enforcement Division, DPDM; People's Counsel; Case File

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ZONING COMMISSIONER

IN RE: Petition for Special Hearing 111 Mellor Avenue	*	BEFORE THE
	*	ZONING COMMISSIONER
D.A. Drenner Concrete, Inc., Legal Owners; Linda J. Amos & Susanne Gigliotti, Petitioners	*	FOR BALTIMORE COUNTY
	*	CASE NO.: 03-456-SPH

* * * * * * * * * * * * *

RESPONDENT'S MEMORANDUM

D.A. Drenner Concrete, Inc., Legal Owner and Respondent, by its attorney Benjamin Bronstein, submits this Memorandum in response to the Petition for Special Hearing.

Statement of the Case

This is the third proceeding brought by certain neighbors against D. A. Drenner Concrete, Inc.. ("Drenner). The first proceeding was initiated before the Code Enforcement Hearing Officer in 1998. The second proceeding was again initiated before the Code Enforcement Hearing Officer in 2002. Both those proceedings resulted in determinations favorable to Drenner and adverse to the neighbors.

Unfazed by these repeated rejections of their efforts to shut down the small business of Drenner, the neighbors initiated this present action, based on the same facts and legal basis as their two earlier efforts.

Statement of Facts

Drenner operates a small concrete business from premises located at 111 Mellor Avenue, located in Baltimore County. The property is zoned BM, and is approximately .5 acres in size. The property is rectangular in shape, about 60' x 355', with frontage on the east side of Mellor Avenue. The property has a metal garage building and faces residential property on the west side of Mellor Avenue. The east side of Mellor Avenue is all commercial properties.

The 1998 proceeding was initiated after one of the residential neighbors complained about alleged noise from the property in the early morning hours and the condition of the property. As a result of investigation by the zoning inspector, a code enforcement citation was issued. The basis of the citation was that Drenner was conducting on the property a use not permitted in a BM zone.

At the hearing on the citation, Mr. Drenner testified that the property was leased from Baltimore City starting in 1993. The evidence established that Drenner operated concrete business from the property, and that the property is surrounded by a chain link fence (now board on board) with screening on the front and sides of the property which face the residences across Mellor Avenue. At the hearing, Mr. Drenner agreed to remove a trailer from the site.

The City of Baltimore presented testimony and evidence to show that the City had owned the property since 1923, and that since at least 1938 the property has been used as a site for the storage of heavy equipment and material for the maintenance of water and sewer facilities in the County. Existing bins on the property were built by the City to store materials. Drenner and the City presented additional evidence that the property had been used as contractor's storage yard prior to the institution of zoning in Baltimore County.

Based on the evidence presented, the Code Enforcement Hearing Officer found that the evidence produced by Drenner and the City demonstrated that the property had been used as a contractor's storage yard before the effective date of the zoning laws in Baltimore County. The Hearing Officer found that Drenner and the City had shown that the property had been nonconforming since the passage of the zoning laws of the County.

The Hearing Officer correctly observed that, in essence, the designation of a use as nonconforming us utilized to grandfather a use otherwise precluded by the subsequently enacted

zoning laws. Thus, if a property was used in a certain fashion prior to the adoption of the zoning classification or regulation which might currently prohibit that use, the use may continue.

Based on the testimony and evidence before him, the Hearing Officer concluded that the use of the property by Drenner was consistent with the prior use of the property by the City, which predated the enactment of zoning regulations in Baltimore County. As a grandfathered use, the Hearing Officer determined that Drenner's use of the property was not in violation of the Baltimore County zoning laws and regulations. The complaint was therefore dismissed.

The second code enforcement violation proceeding initiated by the neighbors occurred in the Spring of 2002. As before, Drenner was charged with operating a contractor's storage not permitted in the zone without the benefit of a nonconforming use. Based on the testimony from the prior hearing, and considering the additional testimony of neighbors, the Hearing Officer concluded that the prior determination that a nonconforming use existed on the property remained correct, saying "Based on the testimony in this case and the finding in the prior case, I am again persuaded that the subject property has been used as a contractor's construction storage since 1938 or earlier."

Having failed twice in their efforts to have Drenner's business terminated under the guise of a zoning violation, the neighbors have instituted the instant proceeding. This proceeding is based on the same facts and legal basis as the two prior actions – viz., that the operations of Drenner on the property are illegal, despite the Hearing Officer twice concluding that the property has been used as contractor's storage yard "since 1938 or earlier."

Argument

A. The instant proceeding is barred by principles of collateral estoppel.

As a matter of law, principles of collateral estoppel preclude the complaining neighbors from maintaining this action. This issue was decided adversely to petitioners by the Court of Appeals of Maryland in the case of *Batson v. Shifflett*, 325 Md. 671, 602 A.2d 1191 (1992).

In *United States v. Utah Construction Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the Court spoke particularly to the preclusive effect of administrative law rulings, stating that:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Id. At 422, 86 S.Ct. at 1560, 16 L.Ed.2d at 661.

Thus, agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court. *Batson*, 602 A.2d at 1200. Since Utah Construction Co., collateral estoppel routinely has been applied to factual determinations made by federal agencies following a fair adversarial hearing. *Batson*, supra and cases cited therein.

The rule in Maryland does not differ in any material respect from that adopted by the federal courts. See, *White v. Prince George's County*, 282 Md. 641, 658-59, 387 A.2d 260, 270 (1978) (preclusive effect given to quasi judicial proceeding of Maryland Tax Court, which is an administrative agency). Although early Maryland cases made the sweeping statement that decisions of administrative agencies can never be *res judicata*, this Court later came to recognize that the principles of public policy underlying the rule of *res judicata* were applicable to some administrative agencies performing quasi judicial functions. Id. At 658, 387 A.2d at 270.

In determining the test to be applied in considering whether to give preclusive effect to the decision of an administrative agency, the Court of Appeals in Batson recognized that such a determination hinges on three factors: (1) whether the agency was acting in a judicial type capacity; (2) whether the issue presented in the present proceeding was actually litigated in the previous proceeding; and (3) whether its resolution was necessary to the prior proceeding. 602 A.2d at 1200. This test was first enunciated in *Exxon Corp. v. Fischer*, 807 F.2d 842, 845-46 (9th Cir. 1987), and its three prongs are supported by the Supreme Court case on issue preclusion. Id.

The first prong of the Exxon test is met in the instant case by the 1998 proceeding before the Hearing Examiner and by the 2002 proceeding before the Hearing Examiner. "By conducting a hearing, allowing the parties to present evidence and ruling on a dispute of law, the agency acted in a judicial capacity." Id. At 1202 (quoting from the opinion below, *Batson v. Shifflett*, 86 Md. App. 340, 356, 586 A2d. 792, 799, quoting *West Coast Truck Lines v. American Industries*, 893 F.2d 229, 235 (9th Cir. 1990).

The second prong of the Exxon test is whether the issue presented in proceeding in question was actually litigated in the prior proceeding to whose determination preclusive effect is sought to be given. *Batson*, 602 A.2d at 1202. In the present case, it is manifest that precisely the same issue – whether Drenner's use of the property is a nonconforming use – has been litigated twice before the Hearing Officer in 1998 and 2002.

The third prong of the Exxon test is whether resolution of the issue was necessary to the prior decision. Id. 602 A.2d at 1203. A factual issue is necessary to the determination only if its resolution is required to support the judgment entered in the prior proceeding. Id. In the present case the Hearing Officer twice determined – in both 1998 and 2002 – that the property had been used as a contractor's storage yard "since 1938 or earlier." Determination of this fact, contested

by the complaining neighbors who introduced evidence on the issue, was "required to support the judgment entered in the prior proceeding", viz., that Drenner's use of the property constituted a nonconforming use.

Parenthetically, it should be noted that the Exxon test takes into account the distinction between *res judicata* and collateral estoppel. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Court discussed the distinction between *res judicata* and collateral estoppel, remarking that:

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Id. At 326 n. 5, 99 S.Ct. at 649 n. 5, 58 L.Ed.2d at 559 n. 5. These factors are incorporated in prongs two and three of the Exxon test, that the issues be actually litigated and necessary to the outcome of the prior proceeding. *Batson*, 602 A.2d at 1201.

This point is instructive in the instant proceeding to the extent Petitioners' attempt to argue that the construction of the zoning regulations is wholly within the province of the Zoning Commissioner. Regardless, the Petitioners' claim is precluded by the doctrine of collateral estoppel.

In light of the fact that the issue of whether Drenner's use of the property is a nonconforming use has been twice decided in Drenner's favor, and under the principles of law enunciated by the Court of Appeals, the petitioners' claim in this proceeding is barred by collateral estoppel and must be dismissed. *Batson v. Shifflett*, supra.

B. The *Youngstown* case cited by Petitioners is wholly inapposite to the present case.

Petitioners rely heavily, if not exclusively, on the case of *Youngstown Cartage Co. v. North Point Peninsula Community Co-ordinating Council*, 24 Md. App. 624, 332 A.2d 718 (1975) as the legal support for their position in this proceeding. Such reliance is greatly misplaced, since the case cited by them is wholly inapposite to the issues raised in the instant case.

The *Youngstown* case stands for the legal proposition that a private enterprise's use of government-owned land for private purposes did not constitute a "public use" of the property. This holding has no bearing on the issues raised herein.

The evidence before the Hearing Officer established (on two occasions) that the Drenner property had been used as a contractor's storage yard since "at 1938 or earlier." The evidence further established that Drenner had purchased the property. The property at issue in this proceeding is not, therefore, owned by a government. Nor is there any issue raised that Drenner's use of the property is for a "public use."

As a result, neither portion of the holding in *Youngstown* is apposite to the case at bar. Simply put, the *Youngstown* case gives no support to petitioners.

C. The Petitioners' claims in this proceeding are barred by the doctrine of laches.

The record is clear that the complaining neighbors had knowledge of Drenner's use of the property since at least 1998, when they brought the first prior action before the Hearing Officer. The present proceeding, however, was not brought until 2002.

The doctrine of laches is based on the general principles of estoppel and implies that a complaining party has exhibited a lack of due diligence in asserting a right to the detriment of the defendant. *Jahnigen v. Smith*, 143 Md.App. 547, 795 A.2d 234, certiorari denied, 369 Md. 660, 802 A.2d 439 (2002).

Laches is a defense in equity against stale claims, and is based on grounds of sound public policy by discouraging fusty demands for the peace of society. *Skeen v. McCarthy*, 46 Md. App. 434, 418 A.2d 1214, certiorari denied, 289 Md. 740 (1980).

Generally, to determine the applicable measure of impermissible delay to bar an action the doctrine of laches, if there is no action at law directly analogous to the action in equity, the general three-year statute of limitations will be used as a guideline. *Schaeffer v. Anne Arundel County*, 338 Md. 75, 656 A.2d 751 (1995).

The present proceeding is the third to which Drenner has been subjected by the complaining neighbors. Twice he has been vindicated, in proceedings which clearly and unequivocally determined the property had been used as a contractor's storage yard since at least 1938 and that Drenner's use of the property was a nonconforming use. At any time during the four years since the first the determination of the Hearing Officer the instant action has been brought. Instead, the neighbors stood by as Drenner improved and used the property in his business. His reliance on two separate determinations that his use of the property was lawful would redound to his detriment, should the neighbors not now be precluded by laches from proceeding with this special hearing

Under the circumstances, Petitioners should be barred by the doctrine of laches from now bringing this action for a special hearing four years after there existed knowledge of the facts on which this claim is based. The neighbors instead utilized other avenues to halt Drenner's use of the property. Those having failed, they now cast about for yet another way to continue the assault on this small business, which continues a use of the property which has existed for at least six and one –half decades. A Hundred Years' War there may have been, but principles of equity -- of which laches is one – demand the neighbors' campaign cease after five.

D. The evidence presented by the complaining neighbors is insufficient, as a matter of law, to establish Drenner's use of the property is other than a nonconforming.

The instant proceeding has its genesis in the filing of a request for a special hearing by two neighbors of Drenner. As Petitioners, the burden is on them to establish that the use of the property by Drenner is other than the lawful nonconforming use twice determined by the Hearing Officer.

The burden of proof is generally allocated to the party asserting the affirmative of an issue, or seeking to change the status quo. *Garrett v. State*, 124 Md. App. 23, 720 A.2d 1193, 1195 (1998). In allocating the burden of proof, a major consideration is whether particular facts are more readily available to one party or another; if so, the burden of proving those facts may be placed on the party with that special knowledge or availability. Id.

The Petitioners seek to establish that Drenner's use of the property is not lawful. The status quo is that the lawfulness of that use as nonconforming has twice been established by Drenner in prior proceedings. Additionally, the knowledge of the use of the property is more readily to the neighbors than Drenner. Under these circumstances, the burden of proof on the issue of the nonconforming nature of Drenner's use of the property is properly placed on Petitioners. *Garrett v. State*, supra.

The evidence presented by Petitioners at the hearing in this matter was insufficient to establish that Drenner's use of the property is not nonconforming and, therefore, lawful under the Baltimore County Code Zoning Regulations. All of the witnesses testified at the hearings before the Code Official who ruled in favor of the nonconforming use. The testimony and evidence (the Kuchta letter) presented on behalf of Drenner, on the other hand, was clear and sufficient to establish that (as the Hearing Officer previously found on two prior occasions) the property has been used as a contractor's storage yard "since 1938 or earlier."

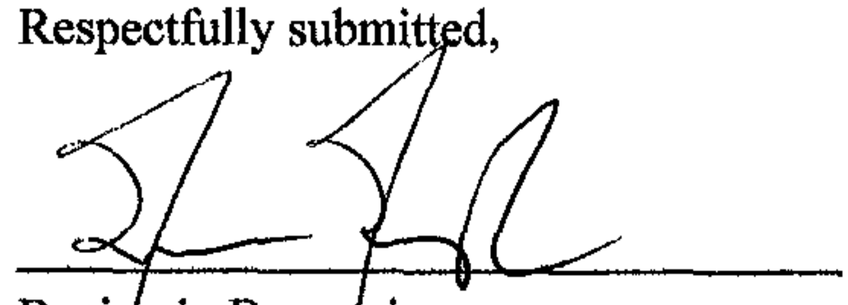
Under the governing principles of law and in light of the failure of Petitioners to meet their burden of proof to establish the use of the property by Drenner is anything other than lawfully conforming, the petition for special hearing must be dismissed.

Conclusion

1. Under the principles of law governing the preclusive effect to be given administrative decisions enunciated by the Court of Appeals in *Batson v. Shifflett*, supra, the two prior determinations of the Hearing Officer that the property had been used as a contractor's storage since at least 1938, and that therefore Drenner's use of the property was a lawful nonconforming use, bar the claims raised by Petitioners in this proceeding.
2. The *Youngstown* case relied on by Petitioners is inapposite to the present proceeding and does not alter the conclusion the Petitioners' claims are barred under *Batson v. Shifflett*.
3. The doctrine of laches bars the Petitioners' claims where they have had knowledge of the facts for four years prior to the institution of this action during which Drenner has relied to its detriment on the two previous decisions of the Hearing Officer that Drenner's use of the property was lawful.
4. The burden of establishing that Drenner's use of the property is other than lawfully nonconforming is on the Petitioners. The evidence presented by Petitioners failed to meet this burden, while the evidence of Drenner established the lawfully nonconforming nature of Drenner's use of the property (as Drenner has twice previously established before the Hearing Officer in prior proceedings).

WHEREFORE, Drenner respectfully requests that the Request for Special Hearing be dismissed.

Respectfully submitted,

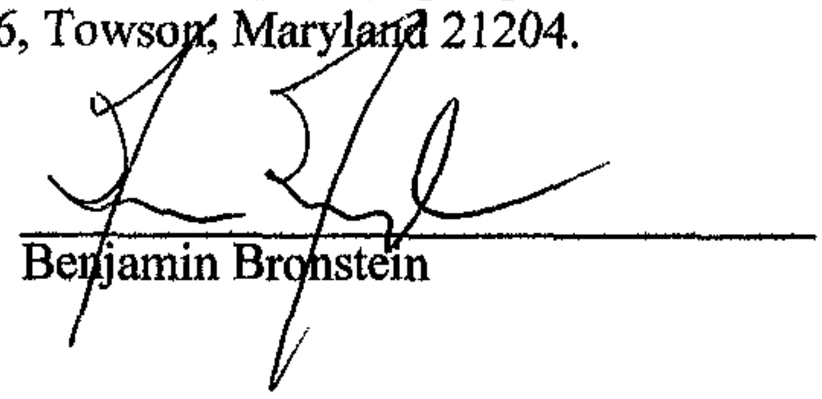


Benjamin Bronstein
Susquehanna Building - Suite 205
29 West Susquehanna Avenue
Towson, Maryland 21204
(410) 296-0200

Attorney for D.A. Drenner Concrete, Inc.,
Legal Owner & Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY, That on this 12th day of September, 2003, a copy of the foregoing Respondent's Memorandum was mailed, postage pre-paid to Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204.



Benjamin Bronstein

Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at 111 Mellor Ave., Catsonville, M

which is presently zoned BM ODR2 MSK

This Petition shall be filed with the Department of Permits and Development Management. The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve

1. Whether the above property enjoys a valid, non-conforming use status as a contractor's equipment storage yard?
2. Whether Baltimore City's use of the property constituted an activity which made the property exempt from operation of the Baltimore County zoning regulations, while it was so utilized by Baltimore City?
3. Whether Baltimore City's subsequent lease of the property was a proprietary function for remuneration, making the property subject, beginning with the lease term to the operation and effect of the Baltimore County zoning regulations?
4. Whether the Zonning Commissioner/Deputy Zoning Commissioner have the exclusive authority, pursuant to the Baltimore County Charter to interpret the zoning regulations and to decide whether properties are entitled to an Order finding a non-conforming use?

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above Special Hearing, advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

LEGAL OWNER

~~Contract Purchaser/Lessee:~~

D.A. DRENNER CONCRETE INC
Name - Type or Print

NOT THE PETITIONER
Signature

111 MELLOR AVE
Address — Telephone No.

CATONSVILLE — MD — 21228
City — State — Zip Code

Neighboring ~~Legal Owner(s):~~ PETITIONERS NBT

Linda J. Amos
110 Melrose Avenue — (410) 788-7557
Name - Type or Print

Linda J Amos
Signature

Susanne Gigliotti
108 Mellor Ave. — (410) 747-4792
Name - Type or Print

Susanne Gigliotti
Signature

Address — Telephone No.

Catonsville, MD 21228
City — State — Zip Code

Attorney For Petitioner:

Michael P. Tanczyn, Esquire
Name - Type or Print

Michael P. Tanczyn
Signature

Michael P. Tanczyn, P.A.
Company

Suite 106, 606 Baltimore Avenue
Address — Telephone No.

Towson, MD 21204 — (410) 296-8823
City — State — Zip Code

Representative to be Contacted:

Name

Address — Telephone No.

City — State — Zip Code

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING _____

UNAVAILABLE FOR HEARING 5/13/03 to 5/27/03

Reviewed By JNP Date 4/2/03

Case No. 03-456-SPH

REV 9/15/98

Zoning Description for 111 Mellor Avenue

Beginning at a point on the easterly right of way of Mellor Avenue, being a 50.00 foot wide right of way and point also being South 16 degrees 48 minutes 07 seconds East 1383 feet, as now surveyed on the Maryland State Grid System, from the intersection of the easterly right of way of Mellor Avenue and the southerly right of way of Frederick Road; 1) thus leaving Mellor Avenue and running at a right angle to Mellor Avenue North 73 degrees 11 minutes 53 seconds East 62.00 feet to a point; 2) thus running parallel to Mellor Avenue south 16 degrees 43 minutes 07 seconds East 135.00 feet to a point; 3) thus running at right angle to the herein describe second line and also Mellor Avenue. Also running with and binding on the fourth line a recorded in Deed Liber 14361, Folio 556, South 73 degrees 11 minutes 53 seconds West 62.00 feet to a point on Mellor Avenue; 4) running with and binding the aforesaid Mellor avenue right of way, North 16 degrees 48 minutes 07 seconds West 135.00 feet to the point of beginning. Containing 8368 square feet or .1921 acres of land, more of less.

STATE OF MARYLAND
KEVIN SCOTT JOHNSON
No. 12302
ARCHITECT

03-456-SPH

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 23104

DATE 3/20/03 ACCOUNT 001-006-6150

AMOUNT $ 325 00

RECEIVED FROM: Michael Paul Tarczyn

FOR: Petition Hrg - SPH (03-456-SPH)
111 Mellor Ave. (Amos/Gigliotti)

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER

PAID RECEIPT
BUSINESS ACTUAL TIME
4/02/2003 4/02/2003 09:41:30
REG WB02 MAIL JEVA JEE
>>RECEIPT # 261505 4/02/2003 JFLH
Dept 5 528 ZONING VERIFICATION
CR NO. 025184
Recpt Tot $325.00
325.00 CK .00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

BALTIMORE COUNTY, MARYLAND
OFFICE OF BUDGET & FINANCE
MISCELLANEOUS RECEIPT

No. 29941

DATE 10/10/03

ACCOUNT 001-006-6150

AMOUNT $ 300.00

RECEIVED FROM: Benjamin Bonkin

FOR: Appeal - Case No. 03-456-SPH

~~Variance~~ (Zon)

DISTRIBUTION
WHITE - CASHIER PINK - AGENCY YELLOW - CUSTOMER

PAID RECEIPT

BUSINESS DATE	ACTIVITY DATE	TIME	DESCRIPTION
10/10/2003	10/10/2003	14:52:49	2

REF: MISC NOTE JE06 JE
>RECEIPT # 301040 10/10/2003 FELK
Rept 5 520 ZONING VERIF 12411100
CR AMT 029941
Rept Tot $300.00
300.00 CK .00 CA
Baltimore County, Maryland

CASHIER'S VALIDATION

CERTIFICATE OF POSTING

RE: Case No.: 03-456-SPH

Petitioner/Developer: LINDA AMOS AND SUSANNE GIGLIOTTI

Date of Hearing/ Closing: AUGUST 13, 2003

Baltimore County Department of
Permits and Development Management
County Office Building, Room 111
111 West Chesapeake Avenue
Towson, MD 21204

Attention: BECKY HART

Ladies and Gentlemen: This letter is to certify under the penalties of perjury that the necessary sign(s) required by law were posted conspicuously on the property located at #111 MELLOR AVENUE

The sign(s) were posted on JULY 28, 2003
(Month, Day, Year)

Sincerely,

Garland E. Moore
(Signature of Sign Poster and Date)

GARLAND E. MOORE
(Printed Name)

3225 RYERSON CIRCLE
(Address)

BALTIMORE, MD. 21227
(City, State, Zip Code)

(410) 242-4263
(Telephone Number)

ZONING NOTICE

CASE # 03-456-SPH

A PUBLIC HEARING WILL BE HELD BY THE ZONING COMMISSIONER IN TOWSON, MD

PLACE: ROOM 407, COUNTY COURTS BLDG. 401 BOSLEY AVENUE

DATE AND TIME: WEDNESDAY, AUGUST 13, 2003 AT 9:00 AM.

REQUEST: SPECIAL HEARING TO DETERMINE WHETHER THE ABOVE PROPERTY ENJOYS A VALID, NON CONFORMING USE STATUS AS A CONTRACTORS EQUIPMENT STORAGE YARD, WHETHER BALTIMORE CITY'S USE OF THE PROPERTY CONSTITUTED AN ACTIVITY WHICH MADE THE PROPERTY EXEMPT FROM OPERATION OF THE BALTIMORE COUNTY ZONING REGULATIONS, WHILE IT WAS SO UTILIZED BY BALTIMORE CITY? WHETHER BALTIMORE CITY'S SUBSEQUENT LEASE OF THE PROPERTY WAS A PROPRIETARY FUNCTION FOR REMUNERATION, MAKING THE PROJECT SUBJECT, BEGINNING WITH THE LEASE TERM TO THE OPERATION AND EFFECT OF THE BALTIMORE COUNTY ZONING REGULATIONS? WHETHER THE ZONING COMMISSIONER/DEPUTY ZONING COMMISSIONER HAVE THAT EXCLUSIVE AUTHORITY, PURSUANT TO THE BALTIMORE COUNTY CHARTER TO INTERPRET THE ZONING REGULATIONS AND TO DECIDE WHETHER PROPERTIES ARE ENTITLED TO AN ORDER FINDING A NON-CONFORMING USE?

POSTPONEMENTS DUE TO WEATHER OR OTHER CONDITIONS ARE SOMETIMES NECESSARY.
TO CONFIRM HEARING CALL 887 3391

DO NOT REMOVE THIS SIGN AND POST UNTIL DAY OF HEARING, UNDER PENALTY OF LAW

HANDICAPPED ACCESSIBLE

Baltimore County
Department of Permits and
Development Management

Director's Office
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
410-887-3353
Fax: 410-887-5708

April 14, 2003

NOTICE OF ZONING HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 03-456-SPH
111 Mellor Avenue
N/east side Mellor Avenue, 1,383 feet south of Frederick Road
1st Election District – 1st Councilmanic District
Legal Owner: D.A. Drenner Concrete, Inc.
Petitioners: Linda J. Amos and Susanne Gigliotti

Special Hearing to determine whether the above property enjoys a valid, non-conforming use status as a contractor's equipment storage yard. Whether Baltimore City's use of the property constituted an activity which made the property exempt from operation of the Baltimore County zoning regulations, while it was so utilized by Baltimore City? Whether Baltimore City's subsequent lease of the property was a proprietary function for remuneration, making the project subject, beginning with the lease term to the operation and effect of the Baltimore County zoning regulations? Whether the Zoning Commissioner/Deputy Zoning Commissioner have that exclusive authority, pursuant to the Baltimore County Charter to interpret the zoning regulations and to decide whether properties are entitled to an Order finding a non-conforming use?

Hearings: *Thursday, June 5, 2003 at 9:00 a.m. Room 106, County Office Building,*
111 W. Chesapeake Avenue

Arnold Jablon
Director

AJ:klm

C: Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson 21204
D.A. Drenner Concrete, Inc. 111 Mellor Avenue, Catonsville 21228
Linda Amos, Susanne Gigliotti, 108 Mellor Avenue, Catonsville 21228

NOTES: (1) **THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY WEDNESDAY, MAY 21, 2003.**
(2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
(3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

Printed with Soybean Ink
on Recycled Paper

TO: PATUXENT PUBLISHING COMPANY
Tuesday, May 20, 2003 Issue - Jeffersonian

Please forward billing to:
Michael P. Tanczyn, Esquire 410-296-8823
606 Baltimore Avenue, Suite 106
Towson, MD 21204

NOTICE OF ZONING HEARING

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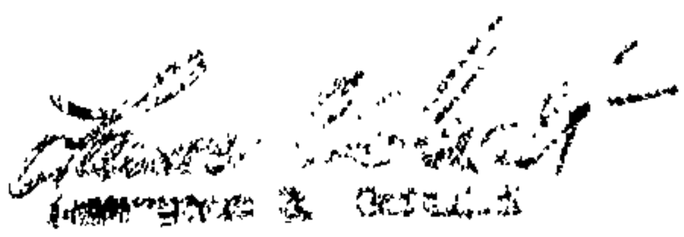
Hearings: Thursday, June 5, 2003 at 9:00 a.m. Room 106, County Office Building,
111 W. Chesapeake Avenue



LAWRENCE E. SCHMIDT
ZONING COMMISSIONER FOR BALTIMORE COUNTY

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT
ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

The Baltimore County Zoning Regulations (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

For Newspaper Advertising:

Item Number or Case Number: 03-456-SPH

Petitioner: Linda J. Amos & Susanne Gigliotti

Address or Location: 111 Mellor Avenue, Catonsville, MD

PLEASE FORWARD ADVERTISING BILL TO:

Name: Michael P. Tanczyn, Esquire

Address: Michael P. Tanczyn, P.A.
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

Telephone Number: 410-296-8823

Revised 2/20/98 - SCJ

EXCLUSIVE RIGHT TO SELL LISTING CONTRACT

Date 9/15/02

LONG AND FOSTER REAL ESTATE, INC. (the "Broker") is hereby authorized by the undersigned owner(s) (the "Owner") or by the authorized representative of Owner to sell as the exclusive real estate broker, the property known as: 111 Medley Ave, Catonsville, Md. 21228 (the "Property"). This authority shall continue until the 14 day of March, 2003 except that either Owner or Broker, by giving written notice, may cancel this Contract so that it will terminate at the end of 30 days from the date of receipt of such written notice. The Owner warrants to Broker that the information shown on the profile sheet for the Property executed by Broker and Owner (the "Profile Sheet") is true and correct. The Profile Sheet is incorporated herein as part of this Listing Contract.

The listing price of the Property is $ 190,000 and shall be the price advertised by Broker. If Owner desires to change the listing price, Owner shall immediately inform Broker in writing of the changed listing price, and such changed listing price shall thereafter be the price advertised by Broker.

Broker shall not be responsible for the care of, or the physical condition of the Property.

Broker is authorized to and shall market the Property, including entering the Property into the Metropolitan Regional Information Systems, Inc. ("MRIS"). Seller acknowledges that Broker is bound by the bylaws, policies and procedures, and rules and regulations governing MRIS.

This Contract shall be void (1) if Broker is not a participant of MRIS at the time of signing hereof or at anytime thereafter, or (2) if the Property is not listed with MRIS. Broker is hereby granted the right to report to MRIS for dissemination in accordance with MRIS's rules and policies (A) any contract of sale and sales price (including the other terms upon which any sale of the Property is made), and/or (B) that the Property is being multiple listed and the terms if such listing. Broker's responsibility to market the Property is suspended by Owner's acceptance of a written offer to purchase the Property.

Owner agrees to pay Broker a fee for services rendered in the amount set forth below ("the Fee") (a) if during the term of this Contract, or any extension thereof, (i) Broker produces a customer to purchase the Property at the listing price and on the terms herein or at such other price or on such other terms as shall be accepted by Owner or agreed upon in writing between Owner and Broker (the "authorized price"); or (ii) Owner shall enter into a written agreement to sell, exchange, convey or transfer the Property to any person or entity whether such person or entity shall have been procured by Broker, by Owner or by any other person or entity, in which event Owner shall within seventy-two (72) hours thereof furnish Broker a copy of such written agreement provided by anyone other than Broker; or (iii) if during the period of (_____) months following the expiration or termination of this Contract, Owner shall enter into a written agreement to sell, exchange, convey or transfer the property to any person who or any entity which, with knowledge of Owner or any agent of Owner, inquired or made inquiry about the Property or negotiated to purchase or exchange the Property during the term of this Contract or any extension thereof, in which event Owner shall within seventy-two (72) hours thereof furnish Broker a copy of such written agreement; except that Owner shall have no obligation to pay the fee to Broker if the Property is sold or exchanged by any other licensed real estate broker following the expiration of this Contract or any extension thereof or following the termination of this Contract as herein provided, unless such termination by Owner shall have been made for the purpose of avoiding the obligation of Owner to pay the fee to Broker.

The amount of Broker compensation is not prescribed by law or established by any membership organization with which the Broker is affiliated.

The fee to be paid by Owner to Broker under the terms of this Contract is (Circle One) 7% 8% 9% 10% of the sales price in a contract entered into by Owner, the authorized price or the listing price, as may be applicable (hereinafter the "Selling Price"), plus (N/A) month(s) ground rent, if any. In the event of an exchange, the fee to be paid by Owner to Broker shall be based on the listing price, plus (N/A) month(s) ground rent, if any. Seller will pay a $195.00 Administrative Fee to Long & Foster at settlement. If Broker prevails in any court action brought to obtain payment of the fee, Broker shall also be entitled to recover in such action Broker's reasonable attorneys fees and court costs.

If a deposit made on any contract of sale for the Property is forfeited to Owner, or if all or part of deposit shall be received by Owner as a settlement made by and between Owner and Buyer, Fifty Percent (50%) of the amounts forfeited or received as settlement shall be paid to Broker for Broker's services, but in no event shall this amount exceed an amount equal to the full fee specified herein.

Broker shall be entitled to cooperate with other brokers as subagents of Broker ("Subagents") and/or brokers retained by prospective buyer's to represent buyer's interests ("Buyers Agents"). Owner consents to Broker's cooperation and fee sharing with Subagents or Buyer Agents (collectively "Cooperating Brokers"). Broker shall pay to any Subagent, who has earned and is entitled to share in the fee, $ _____ or 3 % of the Selling Price, plus (N/A) month(s) ground rent, if any. Broker shall pay to any Buyer Agent who has earned and is entitled to share in the fee $ _____ or 3 % of the Selling Price, plus (N/A) month(s) ground rent, if any.

Regardless of any payment which may be due to a Cooperating Broker, Owner shall pay to Broker all amounts due and owing to Broker pursuant to this Contract irrespective of any dispute which may arise between Broker and Cooperating Broker. Broker and Owner agree that this Contract does not confer upon a Cooperating Broker any right to receive any payment directly from Owner.

FAIR HOUSING: With respect to race, color, religion, sex, national origin, handicap or familial status, the Property is offered in compliance with Title VIII of the Civil Rights of 1968, and the Fair Housing Amendments of 1988. The Property is also offered in compliance with the anti-discrimination provisions of applicable State and local laws.

LEAD PAINT: Owner acknowledges that the Property, if constructed before 1978, is subject to Federal law (Title X) as to the presence of lead based paint and/or lead based paint hazards. Owner represents and warrants to Broker, Broker(s) agents and subagents, intending that they rely upon such warranty and representation, that the Property was constructed (initial one section) X _____ during or after 1978; or _____ before 1978; or _____ Owner is uncertain as to the date of construction. If Owner is uncertain as to date the Property was constructed, Owner agrees that, for the purposes of the sale contemplated by this Listing Contract, the Property will be treated as though it had been constructed prior to 1978. If Title X applies to the Property, Owner acknowledges receipt of brochures entitled "EPA and HUD Real Estate Notification and Disclosure Rule" from Broker, and Owner agrees to comply fully with the requirements as set forth in the Rule.

PROPERTY DISCLOSURE: Owner acknowledges that (a) Broker has informed Owner that any contract of sale entered into for resale of residential real property improved by four or fewer single family units is subject to the requirements of Section 10-702 of the Real Property Article of the Annotated Code of Maryland which obligates Owner to deliver to the Buyer of the Property either a written statement disclosing the condition of the Property, or a written property disclaimer statement, and (b) Broker has furnished to Owner the Maryland Real Estate Commission approved disclosure statement form.

Yes_____ No✓_____ Seller permits Long & Foster to give Seller's name to an ongoing referral to a real estate broker in the area where Seller is relocating. Seller understands that Long & Foster and/or associate may receive a financial benefit for this referral.

This Contract shall be binding upon the respective heirs, personal representatives, assignees and/or successors of the parties hereto.

WITNESS:

_____ _____
Owner or Authorized Representative Date

By: _____
Broker or Authorized Representative

_____ _____
Owner or Authorized Representative Date

(4/96)

Prop. Owner No 1

Baltimore County, Maryland
Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, Maryland 21204

Prop. Dept No 2

In the Matter of
D. A. Drenner Concrete, Inc.
Respondent

Civil Citation No. 00-1503
111 Mellor Avenue

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINAL ORDER OF THE CODE ENFORCEMENT HEARING OFFICER

This matter came before the Code Enforcement Hearing Officer for the Department of Permits and Development Management on 23 April 2002, for a hearing on a citation for violations under the Baltimore County Zoning Regulations and the Baltimore County Code for maintaining an office trailer without an occupancy permit and operating a contractor's storage yard on property zoned BM located at 111 Mellor Avenue.

Ed Creed, Sr., code enforcement inspector stated that the County received a complaint concerning the use of the property and/or the storing of an office trailer on the property. The property was inspected and the inspector found an office trailer on the property without a permit. He also found a concrete masonry and excavation business at the subject property.

On 3 January and 28 January 2002, written correction notices were pursuant to §1-7(c), Baltimore County Code (hereinafter "BCC"), which described with particularity the nature of the violation and the manner of correction. The correction notices were served on the Respondent.

On 31 January 2002 and 5 March 2002, code enforcement citations were issued pursuant to §1-7(d), BCC. The citations were marked in evidence as Plaintiff's Exhibit 1 and 1A and were legally served on the Respondent. The citations described the violations as follows: Baltimore County Zoning Regulations, §415.5; 415.6; 415.3, failure to obtain an extended occupancy permit for an office trailer. BCZR, §101; 102; 1; 1B01.1A, ZCP, §500.9; 500.6; 500.1(A)(B), BCC, §26-121A, failure to cease the operation of a contractor's storage yard in a DR (SIC) zone without the benefit of a non-conforming use. No approved site plan.

Further, the citation proposed a civil penalty of $6400 to be assessed. A code enforcement hearing date was scheduled for 23 April 2002.

Darryl Drenner, President of D.A. Drenner Concrete, Inc., Respondent appeared and testified.

Benjamin Bronstein, Esquire appeared on behalf of the Respondent.

Susanne Gigliotti, Linda Amos, Lewis Kublet, James Bosser, Shirley Marr, Cindy Kublet, Jerome Jett, neighboring residents appeared and testified.

Ed Creed, code enforcement inspector also testified.

Testimony and evidence presented shows that the property consists of .5 acres in area and is zoned BM. The subject property is situated on the East side of Mellor.Avenue.

The East side of Mellor Avenue has other commercial properties, and faces residential property on the West side of Mellor Avenue.

Testimony offered by Ed Creed shows that the Respondent utilizes the property for a contractor's storage yard, which is not a permitted use of right in a FM zone. The office trailer has been removed from the property after receiving the correction notice.

All of the neighbors testified and stated their objections to the continued use of the property as a contractor's storage yard. Some of the neighbors said the property was not used as a contractor's storage yard for a period of time.

In a previous hearing charging Baltimore City and the Respondent with operating an illegal contractor's storage yard at the same location, the City presented testimony and evidence to show that the City has owned the property since 1923. The City showed that the property was being used by the City Bureau of Public Works for the storage of heavy equipment and material for the maintenance of water and sewer in Baltimore County since 1938.

As a result of that hearing, I found that the property has been used continuously as a contractor's storage yard before and after the passage of zoning laws in Baltimore County.

Under Maryland law, the requirements of res judicata or claim preclusion are: 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; 2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and 3) that there was a valid final judgement on the merits. Cassidy v. Bd. of Education, 316 Md. 50, 57, 557A.2d 227 (1989). If all three elements are presented then the final judgement in the first claim bars the entire subsequent claim.

This case meets those requirements. Baltimore County is precluded from prosecuting this matter by the doctrine of res judicata.

Based on the testimony in this case and the finding in the prior case, I am again persuaded that the subject property has been used as a contractor's construction equipment storage yard since 1938 or earlier.

Therefore, IT IS ORDERED by the Code Official, this 5 day of August 2002 that the citations issued in this matter be dismissed.

Signed: Stanley J. Schapiro
Stanley J. Schapiro
Code Enforcement Hearing Officer

Baltimore County, Maryland
Department of Permits and Development Management
111 West Chesapeake Avenue
Towson, MD 21204

RECEIVED
NOV 9 1998

Prop. Order No 3

IN RE: BALTIMORE COUNTY UNIFORM CODE ENFORCEMENT CITATION	*	BEFORE THE
CODE ENFORCEMENT HEARING	*	CODE OFFICIAL
Mayor & City Council of Baltimore City	*	Citation/Case No. 98-2180 111 Mellor Ave.
D.A. Drenner Concrete, Inc.	*	
Respondents		

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINAL ORDER OF CODE OFFICIAL

This matter comes before the Code Official pursuant to §1-7, Baltimore County Code, for consideration of a code enforcement citation issued to the respondents named above by the Division of Code Inspections and Enforcement, Department of Permits and Development Management for violations allegedly occurring at the property known as 111 Mellor Avenue and zoned BM.

The respondent, D.A. Drenner Concrete, Inc. (hereafter "Drenner") did appear and was represented by Ben Bronstein, Esquire.

The respondent Mayor & City Council of Baltimore City (hereafter "City") appeared and was represented by Justin J. King, Esquire, Special City Solicitor.

Appearing and testifying for the respondents were Darrel Drenner and Alva Johnson, Jr.

This code enforcement hearing was duly scheduled, and was conducted on the 27th October 1998.

Testimony was taken from Hope Jacobson, code enforcement inspector.

Testimony and evidence presented indicates that the subject property is approximately .5 acres in area, zoned BM. The property is rectangular in shape, about 60'x 355', with frontage on the east side of Mellor Avenue. The property has a metal garage building and faces residential property on the west side of Mellor Avenue. The east side of Mellor Avenue is all commercial properties.

One of the residential neighbors complained about the noise from the subject property in the early morning hours, and the condition of the property. The inspector visited the property on 19 May 1998, and 4 August 1998 and observed an untagged motor vehicle, a trailer and debris, such as 2x4's, bricks and cinder block , masonry, and used tires. She also observed commercial equipment on the property. Photographs were taken by the inspector and were introduced as exhibits PEx4.

The inspector issued a written correction notice pursuant to §1-7(c), Baltimore County Code, which described with particularity the nature of the violation and the manner of correction, marked PEx 1.

The correction notice instructed the respondents to "cease the operation of a construction equipment storage yard/contractor's equipment storage yard in a BM zone. Remove all equipment and materials from site, including storage trailers and all unlicensed motor vehicles".

On 17 August 1998, pursuant to §1-(d), Baltimore County Code, a code enforcement citation was issued. The citation, marked in evidence as PExs 2&3, were legally served on the respondents by the inspector.

Drenner testified that the property was leased from the City starting in 1993. Drenner operates a concrete, masonry, excavation business at the subject property. He introduced photographs of the property which show the property is surrounded by a chain link fence with screening on the front and sides of the property facing the residences. The photographs were marked in evidence as Respondent's 1,2, 3 and 4. Drenner also agreed to remove the trailers from the site.

The City presented testimony and evidence to show that the City has owned the property since 1923 (see exhibit City #1). That at least by 1938 the property was being used as a Public Works Utility site for the storage of heavy equipment and material for the maintenance of water and sewer in the County (City #2). That the concrete bin shown in the photograph marked Respondent 4 was built by the City to store fill material.

The respondents have presented evidence to show that the property has been used as a contractor's storage yard before the effective date of the zoning laws in Baltimore County. The respondents have shown that the property has been nonconforming since the passage of the zoning laws of the County. Non-conformance is a good defense to the zoning violations cited here.

A nonconforming use is defined in Section 101 of the Baltimore County Zoning Regulations (BCZR) as a "A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use." Nonconforming uses are regulated in Section 104 of the BCZR.

In essence, the nonconforming use designation is utilized to grandfather an otherwise illegal use. That is, if the property was used in a certain fashion prior to the adoption of the zoning classification or regulation which currently prohibits that use, the use may continue. Section 104, BCZR also regulates the expansion, abandonment and discontinuance of nonconforming uses.

Based upon the testimony and evidence presented, all of which was uncontradicted, I am persuaded that the subject property has been used as a contractor's or construction equipment storage yard since at least 1938 and quite possibly before 1938. Based on the uncontradicted the respondents should be dismissed.

THEREFORE, IT IS ORDERED by the Code Official, this 4 day of November 1998, that the citations issued in this matter be dismissed as to both respondents

Stanley J. Schapiro
Code Official

Inst Deed No 4

34

1846	John C. Dietrich, Jr. Trustee to Mayor & City Council of Balto.	This Deed made this ninth day of February in the year nineteen hundred and twenty-five by John C. Dietrich Jr. and Elizabeth G. Dietrich his wife of the City of Baltimore, State of Maryland parties of the first part, unto the Mayor and City Council of Baltimore, a municipal corporation of the State of Maryland party of the second part.

DELIVERED PER TICKET JUL 22 1925

Whereas the Public Improvement Commission acting under the authority vested in it by the acts of 1910. Chapter 373. and the Ordinance of Estimate for the year 1924 has purchased the hereinafter described property to be used by the Water Department of Baltimore City, at and for the sum of Four Thousand and Five Hundred Dollars. ($4,500.00)

And Whereas, The entire amount of the purchase money has been paid by the party of the second part hereto to the said parties of the first part hereto, the receipt whereof is hereby acknowledged.

Witnesseth, That in consideration of the premises and of the sum of one dollar, the receipt whereof is hereby acknowledged, the said parties of the first part do grant and convey unto the said Mayor and City Council of Baltimore, its successors and assigns in fee simple, all that piece or parcel of land situate, lying and being in the City of Baltimore, in the State of Maryland, which is described as follows, that is to say:

Beginning for the same on the east side of Wheeler avenue, at the distance of 156 feet south from the southwest corner of the land described in a deed from Henrietta R. Glenn et al. Trustees, to the Baltimore & Ohio Railroad Company, dated November 8th, 1884 and recorded among the Land Records of Baltimore County in Liber W. P. No. 220, folio 175, running 157 feet 8 inches more or less southerly from the southwest corner of said

said avenue and Frederick Turnpike, and running thence bounding on the east side of Fredericks Avenue North 11 degrees 3 minutes east 355 feet more or less to the south side of a road 3 rods wide laid down on a plat within Circuit Court of Baltimore County Exhibit 1 of Circuit Court for James G. Harwood, et al. Docket 14 folio 177 &c. extending from Fredericks Avenue to the right of way of the Baltimore & Washington Railroad and intended to connect with a similar road 33 feet wide as laid down on said plat extending from said right of way to Bloomsbury Avenue both of said roads to be kept open for mutual accommodation of the lots fronting thereon. Thence east only at right angles to Fredericks Avenue and along the south side of said road with the line running in common with other North 78 degrees 37 minutes East 60 feet more or less to said right of way. Thence binding on the west side of said right of way following the bends in the same Southerly 355 feet more or less to a line drawn to Fredericks Avenue from the place of beginning and thence binding reversely on said line North 78 degrees 37 minutes West 63 feet more or less to the place of beginning

Being the same land and premises which by deed dated June 8th 1909 and recorded among the Land Records of Baltimore County in Liber W.P.C. No. 327 folio 39 was conveyed by Frank Clemens and Fanny Wilson Clemens his wife to the said John G. Dietler Jr.

Together with the improvements thereupon and all the rights, alleys, ways, waters, privileges, streets, roads, and adjoining or running through said property, privileges and appurtenances thereto belonging or in anywise appertaining.

To have and to hold the said ground and premises above described and hereby granted and conveyed, to and unto the said Grantor

and City Council of Baltimore, its successors and assigns, in fee simple forever.

And the said parties of the first part do hereby covenant that they will warrant generally the property hereby conveyed, that they have done no act to encumber said property and that they will execute such further assurances thereof as may be required.

Witness the hands and seals of said Grantors.

John B. Dietter, Jr. (Seal)
Carl Martin Dietter, Elizabeth E. Dietter (Seal)

State of Maryland
City of Baltimore, to-wit:

I hereby certify that on this ninth day of February in the year nineteen hundred and twenty-five, before the subscriber a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared John B. Dietter, Jr. and Elizabeth E. Dietter, his wife, the grantors in the foregoing deed, and acknowledged the same to be their respective act.

In Testimony Whereof I have hereunto set my hand and Notarial seal.

Carl Martin Dietter
Notary Public

(B.M.D.)

Notarial Legal Form and sufficiency approved this day of February, 1925.

City Solicitor

By Assistant City Solicitor.

Recorded Feby. 17, 1925 at 11:20 A. M. Per T. Earl Cox, Wm. P. Cole, Clerk.

1484 R.S. #150	Edward H. Apeley Inc. Deed to Geo. J. Oodel Minnie

This Deed made this ninth day of February in the year nineteen hundred and twenty five between Edward H. Apeley, Inc. a body corporate, a body corporate of the State of Maryland, party of the first part and George J. Oodel and Minnie O.

09/17/98 14:43 NO.571 P02
SEP-17-1998 13:08 P.01/01
410 837 8225
DPW-OFF. OF PERMITS
410 837 8225

R.P. #2

FIXED CAPITA

PROPERTY Catonsville Store Yard

LOCATION Mellor Ave. S. of Frederick Road - Catonsville

USE Store Yard - Bureau of Water Supply

AREA 0.5 Acre (Approx.)

DESCRIPTION Rectangular Lot on East Side Mellor Ave. 1357' South of Frede

STATUS OF TITLE—ENCUMBRANCES—RESTRICTIONS

Fee Simple

RENTAL RECEIVED—TERMS OF TENANCY

Not Rented

AVAILABLE FOR SALE OR RENTAL

None

FLAT No.*	PARCEL No.	DEED No	KIND OF INSTRUMENT	DATE OF INSTRUMENT	GRANTOR	RECORDE
446	410	5000	Deed	2-9-1925	John C. Dietler	WPC 607-34

Howard L.
Chertkof
& Co.

SQUARE FOOT SPECIALISTS

Commercial and Industrial Realtors

19 West Franklin Street
Baltimore, Maryland 21201
(301) 727-2330

March 6, 1986

Prop. Comm
6A

Mr. Francis Kuchta
Director of Public Works
Baltimore City
Room 600
Municipal Building
Baltimore, Maryland 21202

Re: Former Yard Water Department
Mellor Avenue
Catonsville, Baltimore County
Maryland

Dear Mr. Kuchta:

I am writing you today at the suggestion of Dick Hutchings and Richard Lidinsky. The Catonsville Mellor Ltd. Partnership, of which I am the general partner, owns property at 85-105 Mellor Avenue in Catonsville consisting of some commercial buildings and the former Catonsville Shortline Railroad. The City owns a small lot of ground adjoining our property formerly used for the storage of water pipes, sand and gravel, etc. but in recent years it has not been used for any purpose that we can observe. We would be interested in acquiring this property and request that if you determine that it is excess to the City's needs that the process of appraisal may be started so that the property may be valued and we may arrange to purchase it. For your easy reference I am enclosing a copy of the tax plat showing the property marked in yellow and a copy of a map showing the general area. I want to thank you in advance for your help in this matter.

Sincerely,

Howard L. Chertkof

Howard L. Chertkof

HLC/cb

Enc.

cc: Mr. Richard Hutchings
Department of Real Estate
Baltimore City

Mr. Richard Lidinsky
Comptrollers Office
Baltimore City

CITY OF BALTIMORE

WILLIAM DONALD SCHAEFER, Mayor

DEPARTMENT OF PUBLIC WORKS

FRANCIS W. KUCHTA, Director
600 Municipal Building, Baltimore, Maryland 21202

Info Only
6B

March 14, 1986

Mr. Howard L. Chertkof
19 West Franklin Street
Baltimore, Maryland 21201

Re: Mellor Avenue Water Yard in Catonsville, Maryland

Dear Mr. Chertkof:

The Bureau of Water and Waste Water of this department has maintained a small yard on Mellor Avenue which houses both men and material at the present time. This yard has existed for many years. The location of the yard provides service to Catonsville and adjacent communities in the maintenance of the distribution system. The overall efficiency of the crew is enhanced by use of this location.

Currently there is no plan to discontinue the use of the yard. Relocation of the crew to existing facilities is not practical at this time. I sincerely hope that the aforementioned clarifies this department's position as to the subject property.

Sincerely,

/SIGNED/ FRANCIS W. KUCHTA

Director

FWK:JST:mjb

cc: Mr. Richard Lidinsky
Mr. Richard P. Hutchins
Mr. Jay S. Thorpe
Mr. Lawrence E. Hudson

File

BALTIMORE COUNTY, MARYLAND
Interoffice Memorandum

DATE JANUARY 19, 2005

TO: PETER MAX ZIMMERMAN, PEOPLE'S COUNSEL

FROM: W. CARL RICHARDS, JR., ZONING SUPERVISOR WCR

SUBJECT: CASE # 03-456-SPH (D.A. DRENNER CONCRETE, INC., 111 MELLOR AVENUE)

IN RESPONSE TO YOUR 12/27/04 MEMO REGARDING THE ZONING HISTORY OF THE ABOVE LOCATION, PLEASE BE ADVISED THAT THE PROPERTY WAS SHOWN SPLIT-ZONED ON THE 2004,2000,1971, AND 1960 ZONING MAPS. ON THE 1945 ZONING MAP CASE # 2800 IS REFERENCED THIS CASE DENIED INDUSTRIAL ZONING AND GRANTED ON 2/5/54 A-RESIDENCE TO E-COMMERICAL. THIS CASE EXTENDED ABOUT 50 FEET TO 60 FEET SOUTH OF THE CURRENT BM/DR-2 ZONE LINE.

SW 3 7 20 SW 3F 1st

E/S @ 1133K

To: DD
See me -
12/28 Carl

BALTIMORE COUNTY, MARYLAND

INTEROFFICE MEMORANDUM

TO: W. CARL RICHARDS, JR., ZONING SUPERVISOR

FROM: PETER MAX ZIMMERMAN, PEOPLE'S COUNSEL FOR BALTIMORE COUNTY

PMZ

SUBJECT: IN THE MATTER OF D.A. DRENNER CONCRETE, INC.

CASE NO. 03-456-SPH

DATE: DECEMBER 27, 2004

The above case involves property at 111 Mellor Avenue. In connection with the County Board of Appeals hearing pertinent to nonconforming use status, we have promised to supply the CBA with the specific zoning history. Please supply my office with a memo or letter stating the zoning history of this property from creation to the present.

Please note that the current zoning is split between B.M. and D.R.2 and appears to have been in place for a substantial period of time. The record also shows that in 1954, the property was zoned residential and that a request for industrial zoning was denied. We do not know the specific chronology or evolution.

If you have any questions, please contact my office.

PMZ/rmw

Enclosure

Maryland Department of Assessments and Taxation
BALTIMORE COUNTY
Real Property Data Search

Go Back
View Map
New Search
Ground Rent

Account Identifier: **District** - 01 **Account Number** - 0113200001

Owner Information

Owner Name:	GATEWAY PARTNERS LLC	**Use:**	COMMERCIAL
		Principal Residence:	NO
Mailing Address:	3333 VELVET VALLEY DR WEST FRIENDSHIP MD 21794-9430	**Deed Reference:**	1) /20092/ 8 2)

Location & Structure Information

Premises Address
111 MELLOR AVE

Legal Description
111 MELLOR AVE ES
1350 FT S FREDERICK RD

Map	Grid	Parcel	Sub District	Subdivision	Section	Block	Lot	Group	Plat No: Plat Ref:
101	8	1983						82	

Special Tax Areas **Town** **Ad Valorem** **Tax Class**

Primary Structure Built	Enclosed Area	Property Land Area	County Use
0000		8,370.00 SF	06

Stories	Basement	Type	Exterior

Value Information

	Base Value	Value As Of 01/01/2003	Phase-In Assessments As Of 07/01/2004	As Of 07/01/2005
Land:	10,800	33,300		
Improvements:	2,000	6,500		
Total:	12,800	39,800	30,800	39,800
Preferential Land:	0	0	0	0

Transfer Information

Seller: D A DRENNER CONCRETE INC	**Date:** 05/20/2004	**Price:** $85,000	
Type: IMPROVED ARMS-LENGTH	**Deed1:** /20092/ 8	**Deed2:**	
Seller: MAYOR & CITY COUNCIL OFBALTIMORE	**Date:** 03/17/2000	**Price:** $12,500	
Type: NOT ARMS-LENGTH	**Deed1:** /14361/ 556	**Deed2:**	
Seller:	**Date:**	**Price:**	
Type:	**Deed1:**	**Deed2:**	

Exemption Information

Partial Exempt Assessments	Class	07/01/2004	07/01/2005
County	000	0	0
State	000	0	0
Municipal	000	0	0

Tax Exempt: NO
Exempt Class:

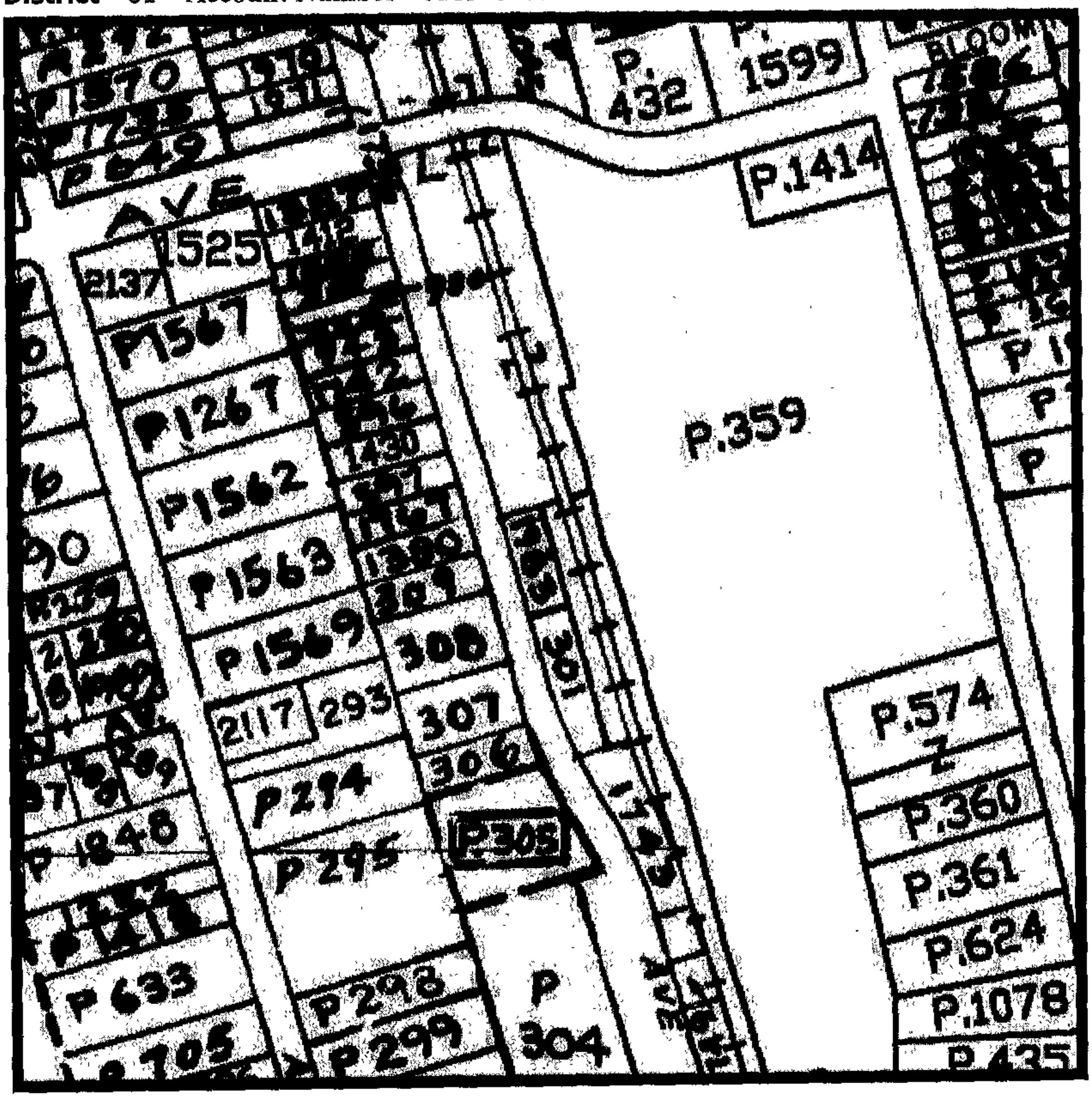
Special Tax Recapture:

* NONE *

Maryland Department of Assessments and Taxation
BALTIMORE COUNTY
Real Property Data Search

Go Back
View Map
New Search

District - 01 **Account Number** - 0113200001



Property maps provided courtesy of the Maryland Department of Planning ©2004.
For more information on electronic mapping applications, visit the Maryland Department of Planning web site at www.mdp.state.md.us/webcom/index.html

Petition for Zoning Re-Classification

To the Zoning Commissioner of Baltimore County:

FRANKLIN REALTY & FINANCE CO., INC. Legal owner of the property situate under contract

All that parcel of land in the First District of Baltimore County

The east side of Mellor Avenue 1357 feet 8 inches southerly from Frederick Road, thence binding east side of Mellor Avenue 135 feet, thence easterly at right angles to Mellor Avenue, 60 feet, more or less to intersect the west side of the railroad right-of-way, thence binding on the west side of said right-of-way northerly 135 feet and thence south 78 degrees 57 minutes west 60 feet, more or less, to beginning. Being property of Franklin Realty & Finance Co., Inc.

Being the same as shown on plan filed with the Zoning Department

Beginning for the east side of Mellor Avenue 1357 feet 8 inches southerly from Frederick Road and the west side of the Baltimore and Ohio Railroad right of way, thence binding on the west side of said railroad right of way southerly 135 feet and thence westerly fifty feet, more or less, to a point 60 feet more or less to the east side of Mellor Avenue

hereby petition that the zoning status of the above described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an RES zone to an E-1 zone.

Reasons for Re-Classification:

Size and height of buildings: front _____ feet; depth _____ feet; height _____ feet.

Front and side set backs of building from street lines: front _____ feet; side _____ feet.

Property to be posted as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above re-classification, advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

FRANKLIN REALTY & FINANCE CO., INC.

By: David H. Abertkof, President

Legal Owner

Address 207 N. Franklin St., Baltimore 1, Md.

ORDERED By The Zoning Commissioner of Baltimore County, this 9th day of November, 1953, that the subject matter of this petition be advertised, as required by the "Zoning Law of Baltimore County," in a newspaper of general circulation throughout Baltimore County, that property be posted, and that the public hearing hereon be had in the office of the Zoning Commissioner of Baltimore County, in the Reckord Bldg., in Towson, Baltimore County, on the 30th day of November, 1953, at 10:30 o'clock A. M.

Zoning Commissioner of Baltimore County

(over)

Pet No 1

E: PETITION FOR RECLASSIFICATION FROM
AN "A" RESIDENCE ZONE TO AN "M"
INDUSTRIAL ZONE - S.S. Keller Ave.,
1357 feet S. Frederick Road, 1st
Dist., Franklin Realty & Finance Co.,
Inc., Petitioner

Pursuant to the advertisement, posting of property and public hearing on the above Petition and it appearing that by reason of location, reclassification for light industrial use would be "spot zoning".

Therefore it is ORDERED by the Zoning Commissioner of Baltimore County this 13th day of January, 1954, that the above petition be and the same is hereby denied for reclassification of the property from an "A" Residence Zone to an "M" Light Industrial Zone. Provided, in accordance with the power and authority invested in the Zoning Commissioner of Baltimore County, I hereby reclassify the property, described in the within petition, from an "A" Residence Zone to an "B" Commercial Zone, said reclassification being an extension of an existing commercial zone.

Zoning Commissioner
of Baltimore County

APPROVED:
COUNTY COMMISSIONERS
OF BALTIMORE COUNTY

Date FEB 5 1954

CERTIFICATE OF POSTING

ZONING DEPARTMENT OF BALTIMORE COUNTY

Towson, Maryland

#7600

District 1st

Date of Posting 11-18-53

Posted for: Est. "A" Residence Zone to an "E" Light Industrial Zone

Petitioner: Franklin Realty & Finance Co. Inc.

Location of Property: S. side of Mellor Ave. 135 ft. 8 inches S. from Frederick Rd. thence binding on Mellor Ave. 135 ft. etc. See Plat.

Location of Sign: East side of Mellor Ave. 427 ft. South of Frederick Rd.

Remarks:

Posted by: Leroy R. Hamel Signature

Date of return: 11-19-53

NOTICE OF ZONING PETITION FOR RECLASSIFICATION

First District

Pursuant to petition filed with the Zoning Commissioner of Baltimore County for change or reclassification from an "A" Residence Zone to an "E" Light Industrial Zone of the property hereinafter described, the Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in the Board Room, Courthouse, Rockland Building, Towson, Maryland, on Tuesday, November 10, 1953, at 10:00 A.M.

to determine whether or not the following mentioned and described property should be changed or reclassified as aforesaid for Light Industrial Use, to wit:

All that parcel of land in the First District of Balto. Co., on the east side of Mellor Avenue 1357 feet 8 inches southerly from Frederick Road, thence binding on east side of Mellor Avenue 135 feet, thence easterly, at right angles to Mellor Ave., 60 feet, more or less, to intersect the west side of the railroad right-of-way, thence binding on the west side of said right-of-way northerly 135 feet and thence Southerly degrees 57 minutes West 60 feet, more or less, to beginning. Being property of Franklin Realty & Finance Co. Inc., shown on plat plan filed with the Zoning Department.

By Order of
Zoning Commissioner
of Baltimore County.

Nov. 13-20.

FILED NOV 17 1953

OFFICE OF

THE BALTIMORE COUNTIAN

THE COMMUNITY NEWS
Reisterstown, Md.

THE COMMUNITY PRESS
Dundalk, Md.

THE HERALD-ARGUS
Catonsville, Md.

No. 1 Newburg Avenue CATONSVILLE, MD.

November 21, 1953

THIS IS TO CERTIFY, that the annexed advertisement of Charles H. Doing, Zoning Commissioner of Baltimore County was inserted in THE BALTIMORE COUNTIAN, a group of three weekly newspapers published in Baltimore County, Maryland, once a week for 2 successive weeks before the 21st day of November, 1953, that is to say the same was inserted in the issues of November 13 and 20, 1953.

THE BALTIMORE COUNTIAN

By Paul H. Reaver
Editor and Manager.

[illegible] petition for reclassification [illegible]

[illegible] property, [illegible] side of Hollar [illegible]

[illegible] southeast from Frederick Road, 1st District,

Baltimore County, Maryland, Franklin Realty & Finance Co., Inc.,

legal owner.

Zoning Commissioner.

Hearing:

Tuesday, November 30, 1953

at 10:00 a.m.

Rockford Building

Towson, Maryland.

PAID

NOV 18 '53

COUNTY COMMISSIONERS

OF BALTIMORE COUNTY

BY

Ret No 2

RPH/cbz

LEASE AGREEMENT

THIS LEASE AGREEMENT, made this 24th day of Oct, 1990 by and between the MAYOR AND CITY COUNCIL OF BALTIMORE, a municipal corporation of the State of Maryland, hereinafter called LESSOR and NICODEMUS CONSTRUCTION CO., INC., a corporation of the State of Maryland, hereinafter called LESSEE.

1. The Lessor in consideration of good and valuable considerations and the performance of other conditions herein set forth, hereby grants to the Lessee the use of:

2. **DESCRIPTION OF PROPERTY:**

Property located on the east side of Mellor Avenue, Baltimore County, Maryland and known as 111 Mellor Avenue, consisting of a fenced in lot approximately 180'x60' and a metal garage building.

3. **USE:**

Use is for a carpentry shop and storage of materials.

4. **TERM:**

A. The term of this Lease Agreement shall be month to month, beginning November 1, 1990.

B. Notwithstanding anything to the contrary contained herein, it is agreed between the parties, that Lessor and Lessee may cancel and immediately terminate this Lease for any reason whatsoever, by the giving of 30 days written notice to the other.

5. **WORK AND SERVICES BY LESSEE:**

A. Lessee accepts the property "As Is" and will maintain the land in reasonable condition.

B. Lessee shall not use or allow the demised area or any part thereof to be used for any illegal, unlawful, or improper purpose, or for any activity which will constitute a nuisance to adjacent properties, or the adjacent neighborhood.

C. Lessee hereby grants Lessor the right to enter upon said premises for the inspection, repair or reconstruction of underground or surface utilities. Lessor will return the land to its original state should excavation be necessary.

D. Lessee shall keep the sidewalks adjacent to the property and entrances thereto reasonably clear of ice, snow and debris.

6. **RENT:**

The rent for said premsies shall be $275.00 (TWO HUNDRED SEVENTY FIVE DOLLARS) per month, payable on the first day of each month in advance.

7. **TAXES:**

In the event the demised property is assessed for real estate taxes the Lessee shall be responsible for the payment of same.

8. **INSURANCE:**

Lessee shall furnish and pay for Public Liability Insurance in the following amounts, $1,000,000.00 per incident with an award aggregate of $1,000,000.00. combined single limit. Such insurance will name the Mayor and City Council of Baltimore as additional named insured. Certificate of this coverage is to be forwarded to the Department of Real Estate, 304 City Hall, Baltimore, Maryland 21202.

9. **NOTICES:**

All notices required under the terms of this Agreement to be given by either party to the other shall be in writing, and unless otherwise specified in writing by the respective parties, shall be sent to the parties and addresses as follows:

(REPRESENTING LESSEE)

Charles Nicodemus
501 S. Rolling Road
Catonsville, Maryland 21228

(REPRESENTING LESSOR)

Department of Real Estate
304 City Hall
100 Holliday Street
Baltimore, Maryland 21202

10. **WAIVER AND HOLD HARMLESS:**

Lessor or its agents, servants and employees, shall not be liable for any injury or damage to Lessees' servants, agents, or employees, or to property on the demised premises resulting from fire, explosion, falling plaster, steam, gas,

electricity, water, rain, or snow, or by any other cause of whatsoever nature unless caused by or due to the negligence of the Lessor or its agents, servants and employees.

Notwithstanding any policy or policies of insurance, Lessee will save Lessor harmless from and against any and all claims or demands at law, in equity or before administrative tribunals arising out of or in connection with Lessees' use and occupation of the demised premises including, without limitation, injury or death to persons and damage to property. The word "Lessees" as used in this paragraph 10, includes, without limitation, Lessees' agents, servants, employees, contractors and business invitees.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written:

ATTEST/WITNESS:

Custodian of City Seal

MAYOR AND CITY COUNCIL OF BALTIMORE

BY: Hyman Aaron Pressman
HYMAN AARON PRESSMAN, Comptroller

NICODEMUS CONSTRUCTION CO., INC.

BY: Charles Nicodemus
CHARLES NICODEMUS, President

STATE OF MARYLAND

TO WIT;

CITY OF BALTIMORE

I HEREBY CERTIFY THAT ON THIS OCT 24 1990 day of , 19 before me, the Subscriber, A Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared HYMAN AARON PRESSMAN, Comptroller and he acknowledged the afore going LEASE AGREEMENT to be the act and deed of said MAYOR AND CITY COUNCIL OF BALTIMORE and in my presence signed the same.

WITNESS my hand and Notarial Seal.

NOTARY PUBLIC

My Commission expires: 9/1/94

Page 3 of a LEASE AGREEMENT by and between MAYOR AND CITY COUNCIL OF BALTIMORE, and NICODEMUS CONSTRUCTION CO., INC., covering 111 MELLOR AVENUE, Baltimore County.

STATE OF MARYLAND
County ~~CITY~~ OF BALTIMORE TO WIT,

I HEREBY CERTIFY THAT ON THIS 17th day of October, 1990 before me, the Subscriber, A Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared CHARLES NICODEMUS, President and acknowledged the afore going LEASE AGREEMENT to be the act and deed of said NICODEMUS CONSTRUCTION CO., INC, and in my presence signed the same.

WITNESS my hand and Notarial Seal.

NOTARY PUBLIC

My Commission expires:
November 1, 1992

APPROVED AS TO FORM AND LEGAL SUFFICIENCY
THIS 19 DAY OF October 1990

Assistant City Solicitor

Page 4 of a LEASE AGREEMENT by and between MAYOR AND CITY COUNCIL OF BALTIMORE and NICODEMUS CONSTRUCTION CO., INC, covering 111 MELLOR AVENUE, Baltimore County.

Pd No 3

RPH/cbz/#8

LEASE AGREEMENT

THIS LEASE AGREEMENT, made this 2nd day of August 1993, by and between the MAYOR AND CITY COUNCIL OF BALTIMORE, a municipal corporation of the State of Maryland, hereinafter called LESSOR and DARREL A. DRENNER, hereinafter called LESSEE.

1. The Lessor in consideration of good and valuable considerations and the performance of other conditions herein set forth, hereby grants to the Lessee the use of:

2. DESCRIPTION OF PROPERTY:

Property located on the east side of Mellor Avenue, Baltimore County, Maryland and known as 111 Mellor Avenue, consisting of a fenced in lot approximately 180'x60' and a metal garage building.

3. USE:

Use is for an office and storage of materials.

4. TERM:

A. The term of this Lease Agreement shall be month to month, beginning August 1, 1993.

B. Notwithstanding anything to the contrary contained herein, it is agreed between the parties, that Lessor and Lessee may cancel and immediately terminate this Lease for any reason whatsoever, by the giving of 30 days written notice to the other.

5. WORK AND SERVICES BY LESSEE:

A. Lessee accepts the property "As Is" and will maintain the land in reasonable condition.

B. Lessee shall not use or allow the demised area or any part thereof to be used for any illegal, unlawful, or improper purpose, or for any activity which will constitute a nuisance to adjacent properties, or the adjacent neighborhood.

C. Lessee hereby grants Lessor the right to enter upon said premises for the inspection, repair or reconstruction of underground or surface utilities. Lessor will return the land to its original state should excavation be necessary.

D. Lessee shall keep the sidewalks adjacent to the property and entrances thereto reasonably clear of ice, snow and debris.

6. RENT:

The rent for said premises shall be $275.00 (TWO HUNDRED SEVENTY FIVE DOLLARS) per month, payable on the first day of each month in advance.

7. TAXES:

In the event the demised property is assessed for real estate taxes the Lessee shall be responsible for the payment of same.

8. INSURANCE:

Lessee shall furnish and pay for Public Liability Insurance in the following amounts, $1,000,000.00 per incident with an award aggregate of $1,000,000.00. combined single limit. Such insurance will name the Mayor and City Council of Baltimore as additional named insured. Certificate of this coverage is to be forwarded to the Department of Real Estate, 304 City Hall, Baltimore, Maryland 21202.

9. NOTICES:

All notices required under the terms of this Agreement to be given by either party to the other shall be in writing, and unless otherwise specified in writing by the respective parties, shall be sent to the parties and addresses as follows:

(REPRESENTING LESSEE)

Darrel A. Drenner
200 Montrose Avenue
Baltimore, Maryland 21228

(REPRESENTING LESSOR)

Department of Real Estate
304 City Hall
100 Holliday Street
Baltimore, Maryland 21202

10. WAIVER AND HOLD HARMLESS:

Lessor or its agents, servants and employees, shall not be liable for any injury or damage to Lessees' servants, agents, or employees, or to property on the demised premises resulting from fire, explosion, falling plaster, steam, gas, electricity, water,

rain, or snow, or by any other cause of whatsoever nature unless caused by or due to the negligence of the Lessor or its agents, servants and employees.

Notwithstanding any policy or policies of insurance, Lessee will save Lessor harmless from and against any and all claims or demands at law, in equity or before administrative tribunals arising out of or in connection with Lessees' use and occupation of the demised premises including, without limitation, injury or death to persons and damage to property. The word "Lessees" as used in this paragraph 10, includes, without limitation, Lessees' agents, servants, employees, contractors and business invitees.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written:

ATTEST/WITNESS:

Catherine A. Pugh

MAYOR AND CITY COUNCIL OF BALTIMORE

BY: ARTHUR E. HELD, Real Estate Officer

BY: Darrel A. Drenner
DARREL A. DRENNER

STATE OF MARYLAND

TO WIT;

CITY OF BALTIMORE

I HEREBY CERTIFY THAT ON THIS 30th day of July, 1993 before me, the Subscriber, A Notary Public of the State of Maryland, in and for the City of Baltimore, personally appeared DARREL A. DRENNER, and he acknowledged the afore going LEASE AGREEMENT to be the act and deed of said DARREL A. DRENNER, and in my presence signed the same.

WITNESS my hand and Notarial Seal.

NOTARY PUBLIC commissioned under the maiden name Jane M Ellis

My Commission expires:

APPROVED AS TO FORM AND LEGAL SUFFICIENCY
THIS 30 DAY OF Aug., 1993

Assistant City Solicitor

Page 3 of a LEASE AGREEMENT by and between MAYOR AND CITY COUNCIL OF BALTIMORE and DARREL A. DRENNER, covering 111 MELLOR AVENUE, Baltimore County.

00 4361 556

Lot N04

SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED is made this 10th day of March, 2000, by **MAYOR AND CITY COUNCIL OF BALTIMORE**, a Municipal Corporation of the State of Maryland, as Grantor, and **D.A. DRENNER CONCRETE, INC.**, a Maryland Corporation, as Grantee.

WITNESSETH:

WHEREAS, the Mayor and City Council of Baltimore in pursuance of the power and authority contained in the provisions of Article V, Section 5(b) of the Baltimore City Charter (1996 Edition) and in pursuance of Ordinance No. 98-381, approved December 21, 1998, has sold the property hereinafter described to the said Grantee; and

WHEREAS, the City Comptroller, acting under the said authority, has sold at private sale unto the Grantee, the said property at and for the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) approved by the Board of Estimates on July 14, 1999 and so entered upon its minutes.

THAT, for and in consideration of the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) and for other good and valuable consideration, receipt of which is acknowledged, Grantor grants and conveys to Grantee, its successors and assigns, in fee simple all rights, title and interest in and to the real property situate and lying in Baltimore County, Maryland described in Exhibit "A" attached hereto and made a part hereof (herein called "Premises").

TOGETHER WITH, all of the improvements thereon and all of the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging or in any way appertaining.

TO HAVE AND TO HOLD, the Premises unto and to the proper use and benefit of Grantee, its successors and assigns, in fee simple, forever.

THE GRANTOR HEREBY COVENANTS, to warrant specially title to that part of the Premises described on Exhibit "A" against all persons lawfully claiming the same by, through or under Grantor, and agrees to execute such further assurances of such Premises as may be requisite.

The Grantee accepts the Premises "as is" in its present condition. There are no understandings, agreements or warranties as to any alterations, additions or remediation to be now or hereafter made by the Grantee.

parcel 1983

REVIEWED SDAT
JZ 3-13-00
BY DATE

0011361 557

IN WITNESS WHEREOF, Grantor has caused these presents to be executed by its duly authorized representatives on the day and year first above written.

WITNESS/ATTEST:

Alternate Custodian of the City Seal

BY: Joan M. Pratt, CPA

Joan M. Pratt, CPA, Comptroller

D.A. DRENNER CONCRETE, INC.

BY: _____

Darrel A. Drenner, President

STATE OF MARYLAND, CITY/COUNTY OF BALTIMORE, TO WIT:

I HEREBY CERTIFY, that on this 23rd day of February, 2000, before me, the undersigned Notary Public of the State of Maryland, personally appeared, **JOAN M. PRATT, CPA, COMPTROLLER**, who acknowledged herself to be the Comptroller for the City of Baltimore, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same for the purposes therein contained as the duly authorized officer of the Mayor and City Council of Baltimore.

AS WITNESS my hand and Notarial Seal.

Notary Public
My Commission Expires: 9/01/02

STATE OF MARYLAND, CITY/COUNTY OF BALTIMORE, TO WIT:

I HEREBY CERTIFY, that on this 18th day of February, 2000, before me, the undersigned Notary Public of the State of Maryland, personally appeared, **DARREL A. DRENNER**, who acknowledged himself to be the President of D.A. Drenner Concrete, Inc., known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged the foregoing deed to be his act and deed of D.A. Drenner Concrete, Inc.

0004361 558

AS WITNESS my hand and Notarial Seal.

Michelle L. Horan
Notary Public
My Commission Expires: 1-1-00

Approved as to form and legal sufficiency
this 22nd day of February, 2000.

Eugene B. Johns
Assistant Solicitor

This is to certify that the within instrument has been prepared by, or under the supervision of, the undersigned Maryland attorney.

Eugene B. Johns

00144361 559

DEVELOPMENT ENGINEERING CONSULTANTS, INC.

Site Engineers & Surveyors

6603 York Road
Baltimore, Maryland 21212
(410) 377-2600
(410) 377-2635 Fax

DESCRIPTION

111 MELLOR AVENUE

Beginning for the same at a point, being a rebar and cap set on the easterly right-of-way of Mellor Avenue, being a 50.00 foot wide right-of-way, said point also being South 16 degrees 48 minutes 07 seconds East 1357.69 feet, as now surveyed on the Maryland State Grid System, from the intersection of the easterly right-of-way of Mellor Avenue and the southerly right-of-way of Frederick Road; 1) thence leaving Mellor Avenue and running at a right angle to Mellor Avenue North 73 degrees 11 minutes 53 seconds East 62.00 feet to a point, being a cross cut (+) set on top of a concrete wall; 2) thence running parallel to Mellor Avenue South 16 degrees 48 minutes 07 seconds East 135.00 feet to a point, being a rebar and cap set; 3) thence running at right angle to the herein described second line and also Mellor Avenue. Also running with and binding on the fourth line as described in a Deed dated May 13, 1954 and recorded among the Land Records of Baltimore County in Liber 2505, Folio 477, South 73 degrees 11 minutes 53 seconds West 62.00 feet to a point, being a rebar and cap set along the above mentioned right-of-way of Mellor Avenue; 4) thence running with and binding on the aforesaid Mellor Avenue right-of-way, North 16 degrees 48 minutes 07 seconds West 135.00 feet to the point of beginning.

EXHIBIT A

00143611 560

"Containing 8,370 square feet or 0.1921 acres of land, more or less.

Being part of that parcel of land conveyed to the Mayor and City Council of Baltimore as described in a Deed dated February 9, 1925, and recorded among the Land Records of Baltimore County in Liber 607, Folio 341.

99-130

10/26/99

003436 562

State of Maryland Land Instrument Intake Sheet

☐ Baltimore City ☑ County: Baltimore

Information provided is for the use of the Clerk's Office, State Department of Assessments and Taxation, and County Finance Office only.

(Type or Print in Black Ink Only—All Copies Must Be Legible)

(☐ Check Box if Addendum Intake Form is Attached.)

1 Type(s) of Instruments: ☑ Deed; ☐ Deed of Trust; ☐ Mortgage; ☐ Lease; ☐ Other; ☐ Other

2 Conveyance Type Check Box: ☐ Improved Sale Arms-Length (1); ☐ Unimproved Sale Arms-Length (2); ☐ Multiple Accounts Arms-Length (3); ☐ Not an Arms-Length Sale (9)

3 Tax Exemptions (If Applicable) Cite or Explain Authority: Recordation; State Transfer; County Transfer — Exempt (Rev 2SD 4-7)

TRP FD SURC $ 5.00; RECORDING FEE 20.00; RECORDATION T 62.50; TR TAX STATE 62.50; TOTAL 150.00; Rept # 84303; Rept # 84314; Bill # 961; Business Office Use Only

4 Consideration and Tax Calculations

Consideration Amount		Transfer and Recordation Tax Consideration	
Purchase Price/Consideration	$ 12,500.00	Transfer Tax Consideration	$
Any New Mortgage	$	X ( )% =	$
Balance of Existing Mortgage	$	Less Exemption Amount –	$
Other:	$	Total Transfer Tax =	$
		Recordation Tax Consideration	$
Other:	$	X ( ) per $500 =	$
		TOTAL DUE	$
Full Cash Value	$ 12,500.00		

5 Fees

Amount of Fees	Doc. 1	Doc. 2
Recording Charge	$	$
Surcharge 20.00	$	$
State Recordation Tax 7.50	$	$
State Transfer Tax 7.50	$	$
County Transfer Tax	$	$
Other	$	$
Other	$	$

Agent: Tax Bill: C.B. Credit: Ag. Tax/Other:

6 Description of Property (SDAT requires submission of all applicable information. A maximum of 40 characters will be indexed in accordance with the priority cited in Real Property Article Section 3-104(g)(3)(i).)

District	Property Tax ID No. (1)	Grantor Liber/Folio	Map	Parcel No.	Var. LOG ☐ (5)
01	0133 2000001	6007/541			

Subdivision Name	Lot (3a)	Block (3b)	Sec/AR (3c)	Plat Ref.	Sq Ft/Acreage (4)

Location/Address of Property Being Conveyed (2): 151 Mellor Ave

Other Property Identifiers (If applicable): Water Meter Account No.

Residential ☐ or Non-Residential ☑ Fee Simple ☑ or Ground Rent ☐ Amount:

Partial Conveyance? ☐ Yes ☑ No Description/Amt. of Sq Ft/Acreage Transferred: 0.1921 ac ±

If Partial Conveyance, List Improvements Conveyed:

7 Transferred From: Doc. 1 - Grantor(s) Name(s): Mayor + City Council of Baltimore; Doc. 2 - Grantor(s) Name(s):

Doc. 1 - Owner(s) of Record, if Different from Grantor(s); Doc. 2 - Owner(s) of Record, if Different from Grantor(s)

8 Transferred To: Doc. 1 - Grantee(s) Name(s): D.A. Drennan Concrete, Inc.; Doc. 2 - Grantee(s) Name(s):

New Owner's (Grantee) Mailing Address: 111 Mellor Ave Baltimore 21230

9 Other Names to Be Indexed: Doc. 1 - Additional Names to be Indexed (Optional); Doc. 2 - Additional Names to be Indexed (Optional)

10 Contact/Mail Information: Instrument Submitted By or Contact Person

Name: Ben Bernstein

Firm: Gebhart Bernstein LLP

Address: 29 W Susquehanna Ave 21204

Phone: (410) 296-2250

☑ Return to Contact Person ☐ Hold for Pickup ☑ Return Address Provided

11 IMPORTANT: BOTH THE ORIGINAL DEED AND A PHOTOCOPY MUST ACCOMPANY EACH TRANSFER.

Assessment Information:
- Yes ☑ No Will the property being conveyed be this grantee's principal residence?
- Yes ☑ No Does transfer include personal property? If yes, identify:
- Yes ☑ No Was property surveyed? If yes, attach copy of survey (if recorded, no copy required).

Assessment Use Only - Do Not Write Below This Line

☐ Terminal Verification ☐ Sectionalization Verification ☐ Where Part ☐ Tran. Program Verification

Transfer Number: Date Received: Deed Reference: Assessed Property No.

	19	19				
Year			Geo.	Use	Block	
Land			Zoning	Bld	Plat	Lot
Buildings			Use	Parcel	Section	Occ. Cd.
Total			Town Cd.	Blk. Gr.	Ex. Cd.	

REMARKS:

Space Reserved for County Recording Clerk

TRANSFER TAX NOT REQUIRED
Director of Budget and Finance
BALTIMORE COUNTY MARYLAND
Per
Date 3-17-2000 Sec 13-139
Authorized Signature

Distribution: White - Clerk's Office; Canary - SDAT; Pink - Office of Finance; Goldenrod - Preparer; AOC-CC-340 (6/98)

THIS DEED, Made this 19th day of May ,1954, by and between the MAYOR AND CITY COUNCIL OF BALTIMORE, a municipal corporation, of the State of Maryland, party of the first part and the STATE OF MARYLAND, to the use of the MILITARY DEPARTMENT, party of the second part.

WHEREAS by Ordnance of the Mayor and City Council of Baltimore, No. 987, approved April 1,1954, the City Comptroller was authorized and directed to sell either at public or private sale, in accordance with Section 169 of the City Charter, the lot of ground hereinafter described, said property being no longer needed for public use; and

WHEREAS the City Comptroller has sold unto the said party of the second part the lot of ground hereinafter described, which sale was approved by the Board of Estimates on the 19th day of May ,1954, and duly entered upon its minutes.

NOW, THEREFORE, THIS DEED WITNESSETH, That in consideration of the sum of Five Dollars ($5.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, the said party of the first part does hereby grant and convey unto the said party of the second part, its successors and assigns, in fee simple, all that lot of ground situate in Baltimore County, State of Maryland, and more particularly described as follows, that is to say:

> BEGINNING for the same at a point on the east side of Mellor Avenue, 291.0 feet south from the southwest corner of the parcel of land described in a lease from Henrietta R. Glenn et al, Trustee, to the Catonsville Short Line Railroad Company by deed dated November 8,1884 and recorded among the Land Records of Baltimore County in Liber W.M.I. No. 143, folio 1, said point being 1492 feet 8 inches southerly from the southeast corner of Mellor Avenue and the Frederick Turnpike and running thence binding on the east side of said Mellor Avenue South 11 degrees 03 minutes 00 seconds East 220.0 feet more or less to the north side of a 32 foot road, as laid out on a plat in the Circuit Court of Baltimore County, exhibit 14 in the case of Lucy G. Ranson et al for James G. Harwood et al Docket 14, folio 177, extending from said Mellor Avenue easterly to the right of way of said Catonsville Short Line Railroad and intended to connect with a similar road 32 feet wide as laid out on said plat, extending from said right of way to Bloomsbury Avenue, both of said roads to be left open for use in common, thence easterly at right angles to said Mellor Avenue and binding on the north side of said first mentioned 32 foot road North 78 degrees 57 minutes 00 seconds East 60 feet more or less to intersect the west side of said right of way, thence binding on the west side of said right of way, following the bends in same,

DEL PER TICKET AU

northerly 220 feet more or less and thence South 78 degrees 57 minutes 00 seconds West 62.0 feet more or less to the place of beginning.

BEING and comprising a portion of the land which by Deed dated February 9,1925 and recorded among the Land Records of Baltimore County in Liber W.P.C. No. 607, folio 341, was granted and conveyed by John C. Distler, Jr. and Elizabeth E. Distler, his wife unto the hereinabove within named Grantor.

TOGETHER with all the rights and appurtenances thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD said lot of ground and premises above described and hereby granted and conveyed unto and to the use of the party of the second part, its successors and assigns, in fee simple forever.

AND the said party of the first part hereby covenants that it will warrant specially the property hereby conveyed; that it has done no act to encumber said property and that it will execute such further assurances thereof as may be requisite.

IN WITNESS WHEREOF the party of the first part has caused these presents to be executed the day and year aforesaid.

MAYOR AND CITY COUNCIL OF BALTIMORE

ATTEST:

By
ARTHUR B. PRICE, Ex-Officio Mayor of Baltimore City

John J. Gallagher, TREASURER

ARTHUR B. PRICE

MAY 19 1954
APPROVED BY BOARD OF ESTIMATES

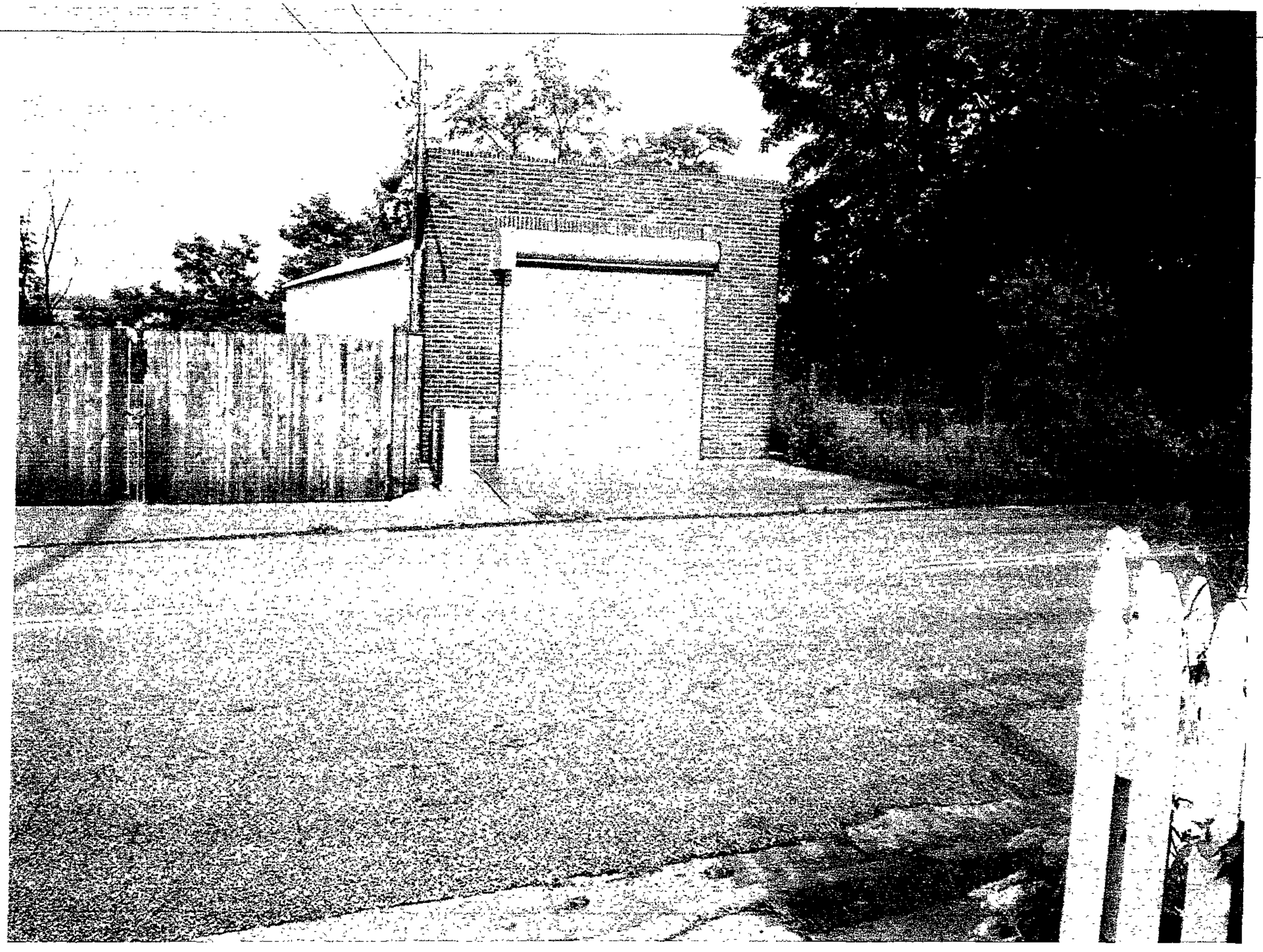
DEPUTY COMPTROLLER

J. NEIL McCARDELL, Comptroller

P. L. HOLLAND, Director of Public Works

THOMAS N. BIDDISON, City Solicitor

Majority of Members of Board of Estimates



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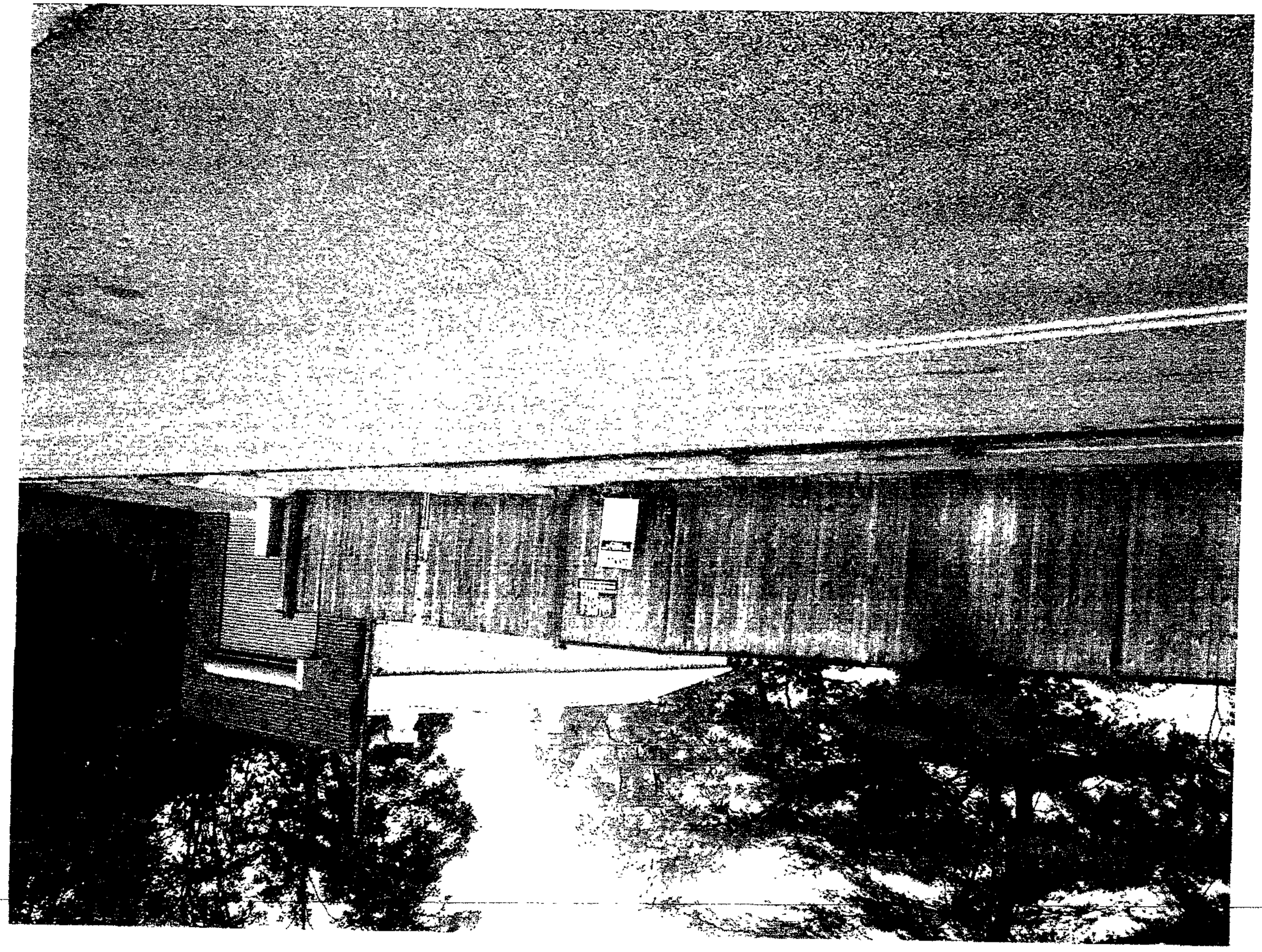

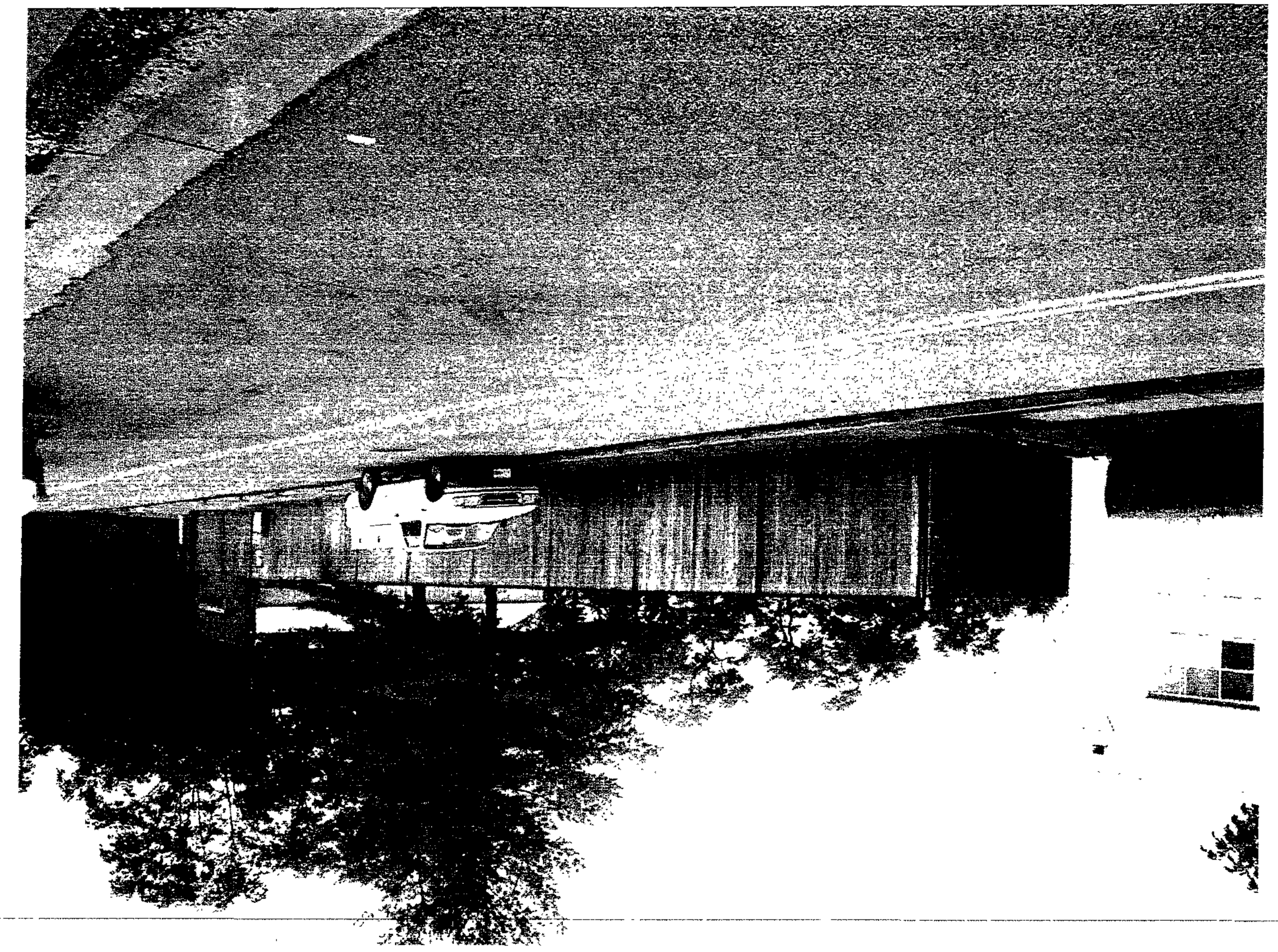

Jerry Jett taken this picture.

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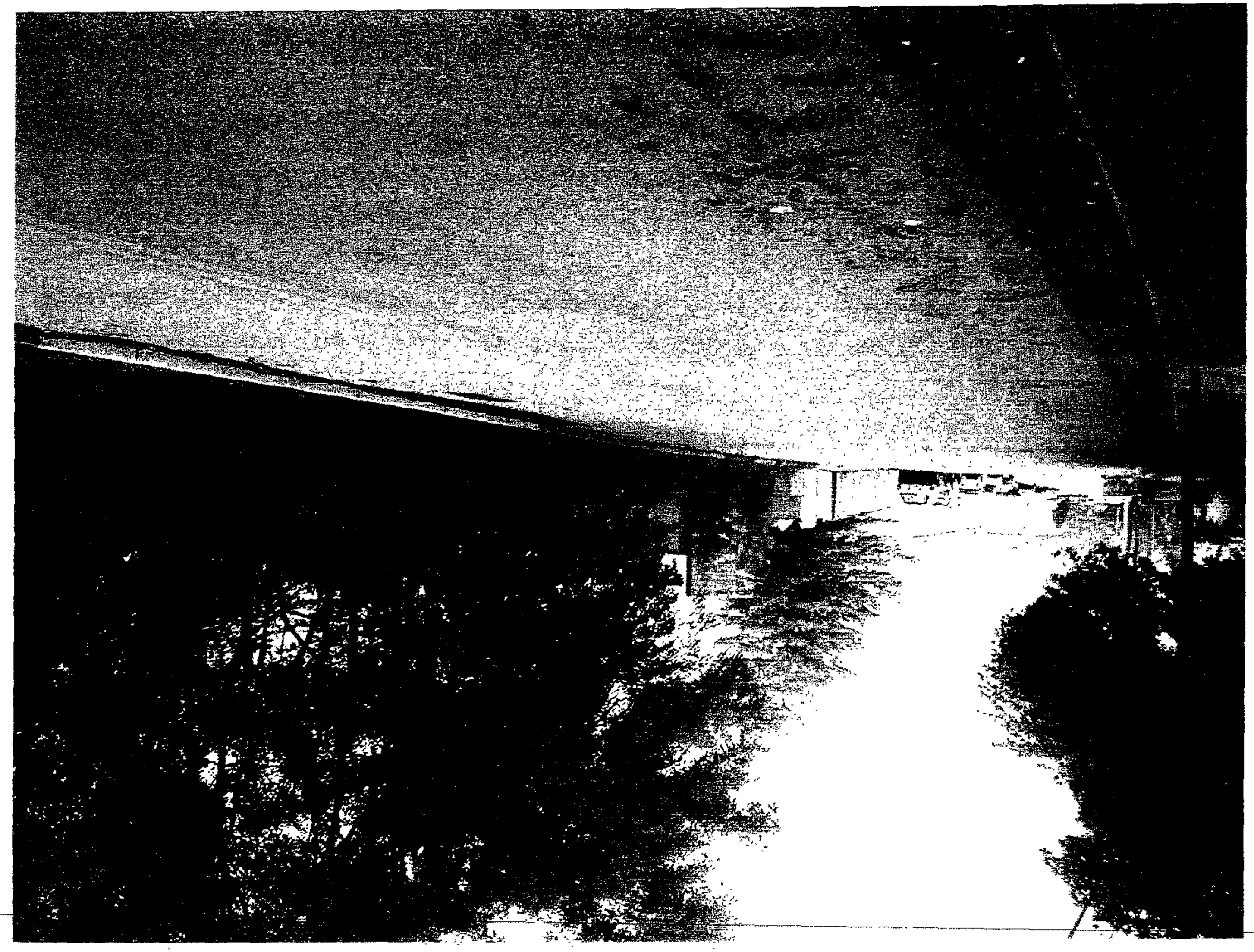


Ref No 10

CITY OF BALTIMORE

DEPARTMENT OF LAW

June 18 2002

S G Samuel Moxley
Baltimore County Councilman
First District
County Council of Baltimore County
Courthouse
Towson, Maryland 21204

RE: 111 Mellor Avenue, Catonsville, Maryland 21228
Mayor's Office of Correspondence Tracking Number 02-7663

Dear Mr Moxley

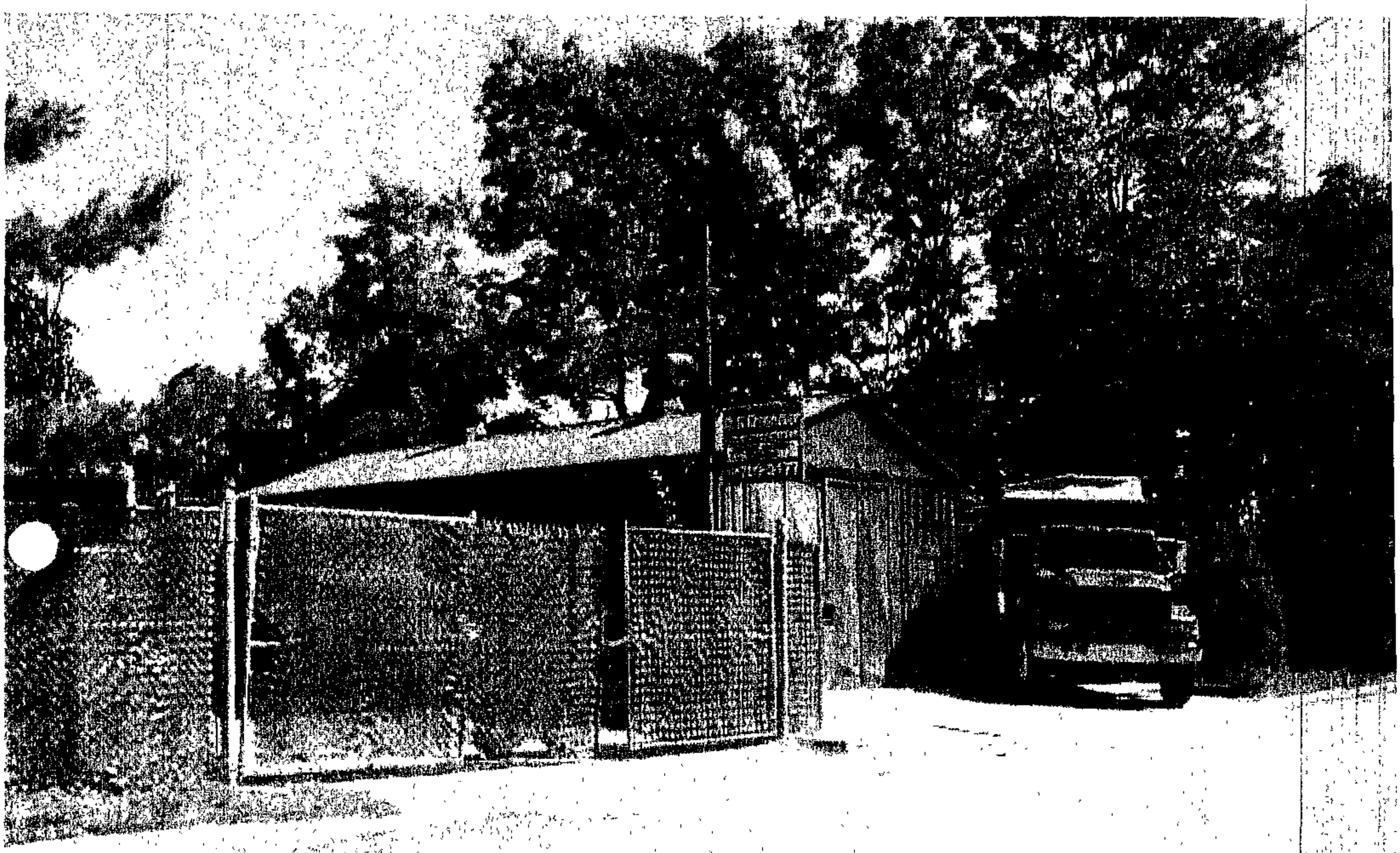
With regard to the above referenced request from your office on behalf from your constituents Ms Susanne Gigliotti and Ms Linda Amos, seeking leasing records while Baltimore City owned the subject property filed pursuant to the Maryland Access to Public Records Act, herewith please find enclosed the only two leases that exist with respect to this property Our records reflect that this property has been used by the City for commercial/industrial heavy equipment storage and maintenance since 1938 The City has owned this property since 1923

Additionally, enclosed please find a copy of the Baltimore County Code Enforcement Citation - Hearing decision concerning allegations of zoning violations Please take the opportunity to enlighten your constituents based on the materials and information attached

Respectfully,

Frederick C. Grant
Chief Solicitor

FCGcem
cc File
Colleen M Koerner
Mayor's Office of Correspondence



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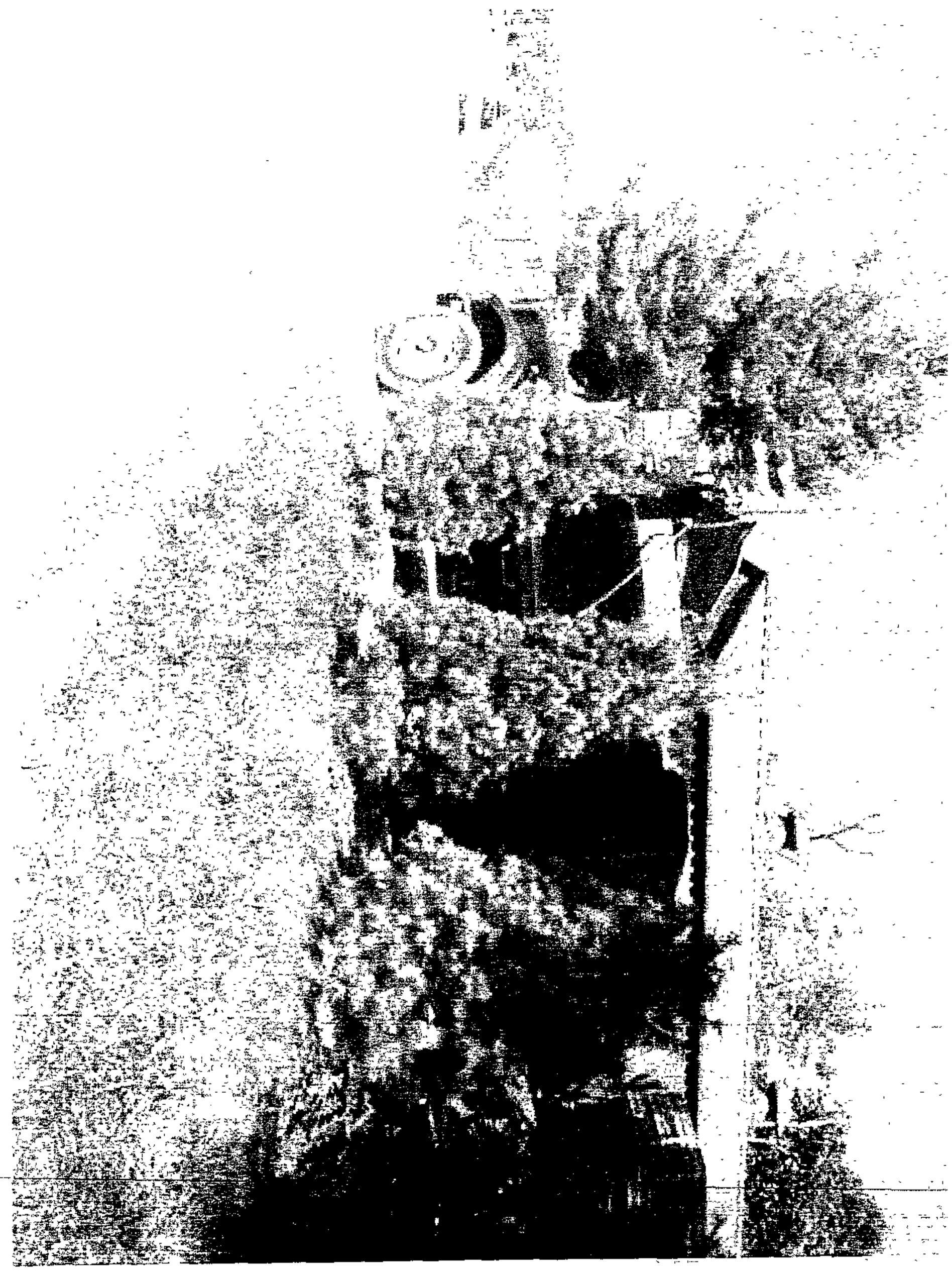

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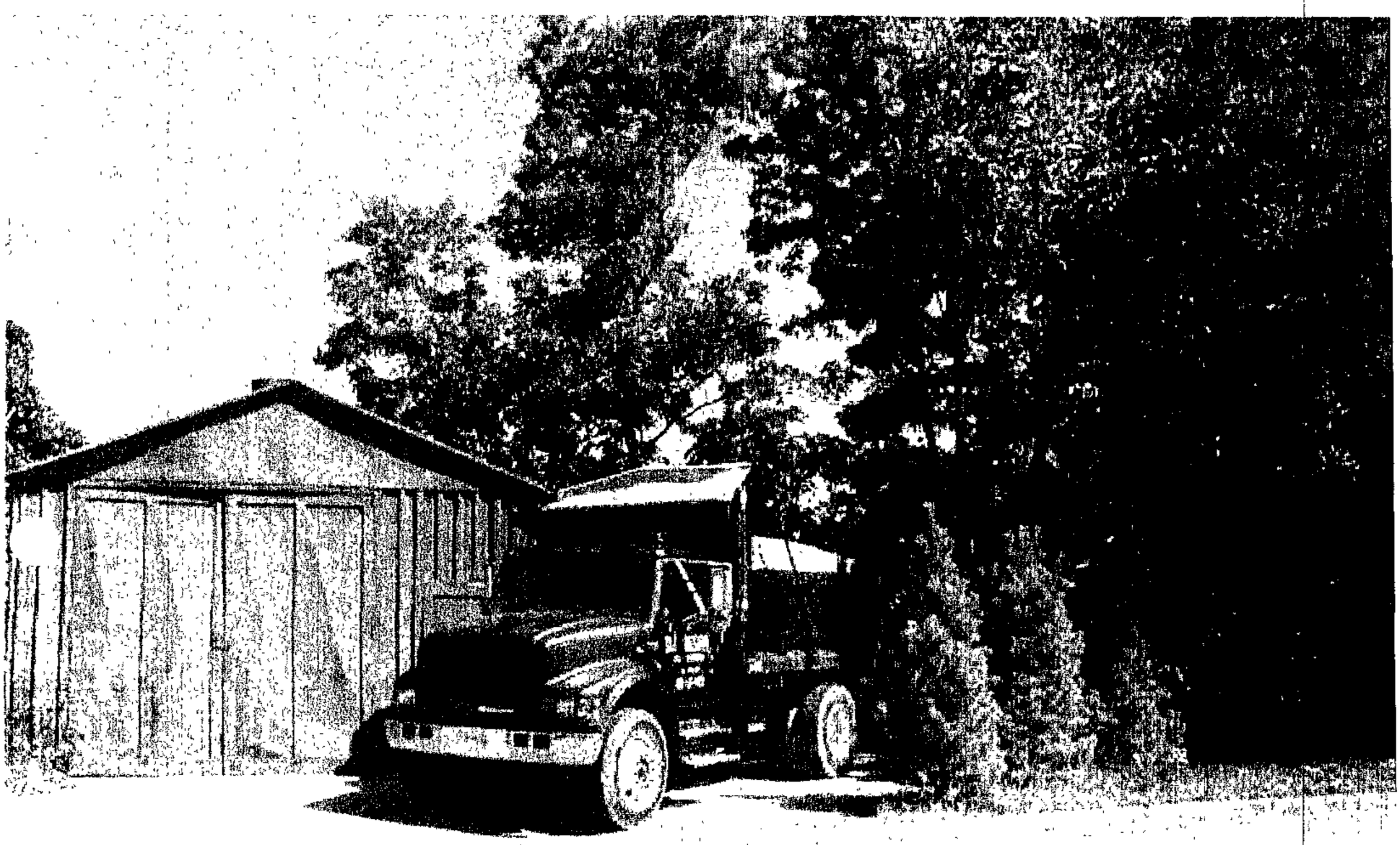

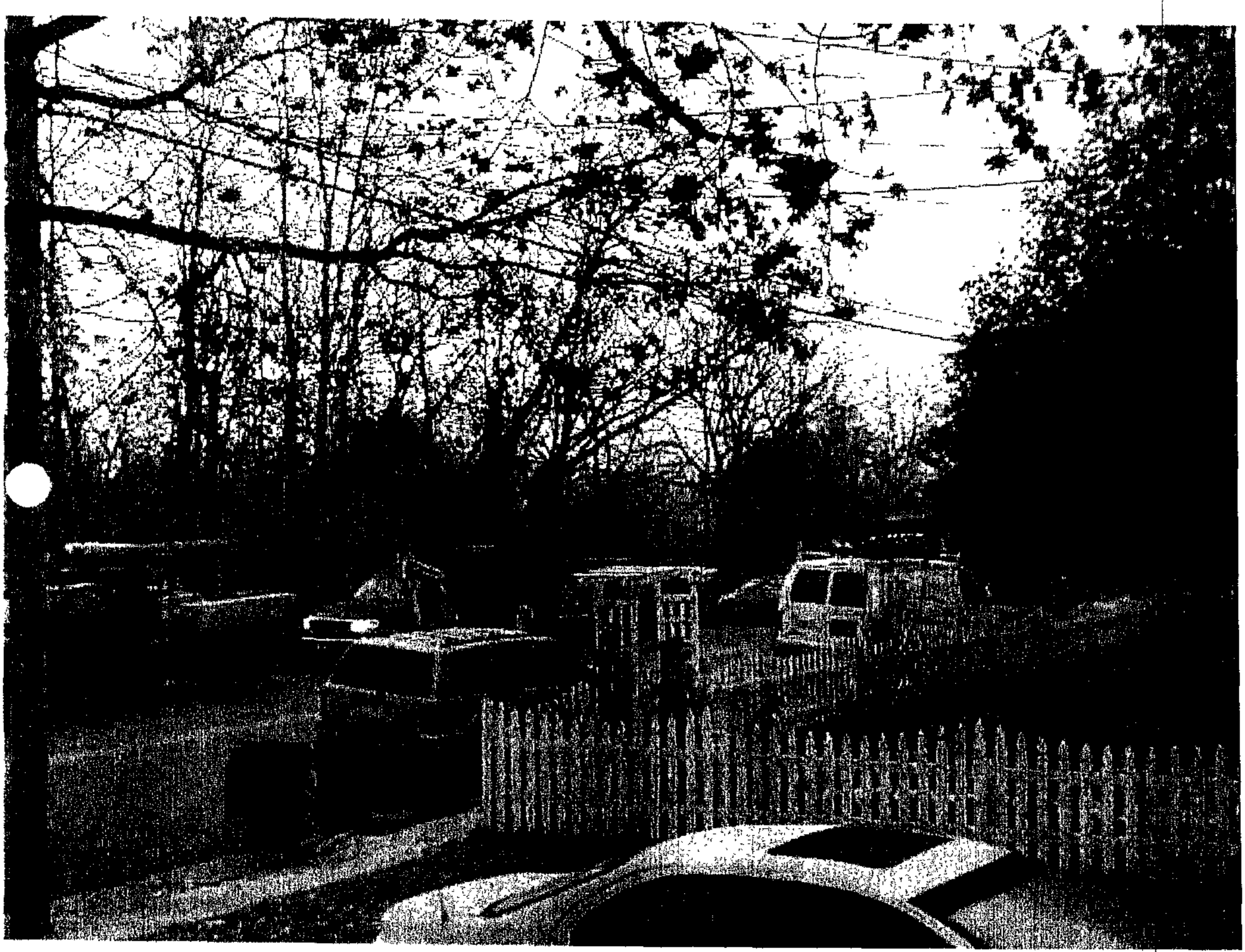

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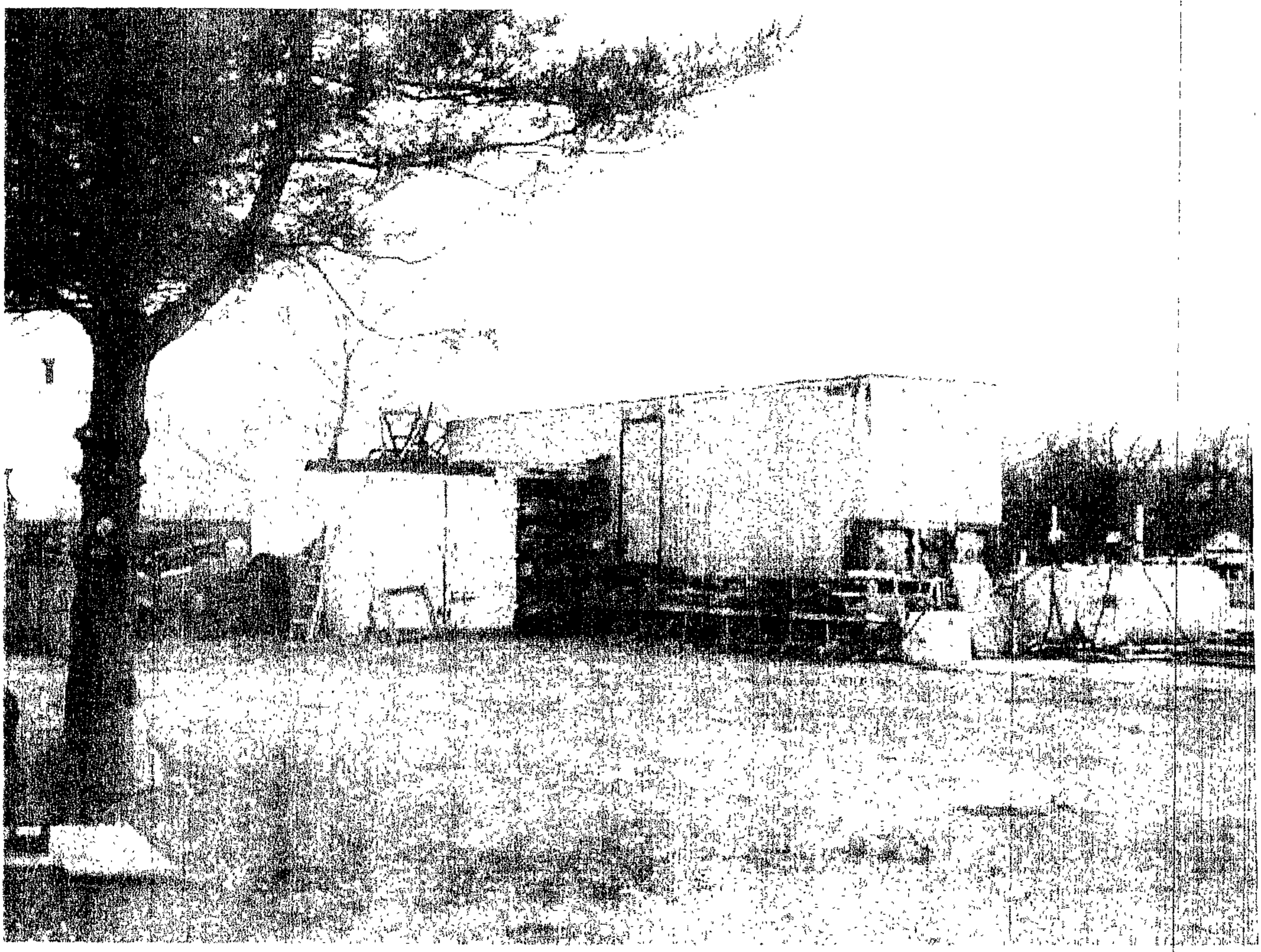

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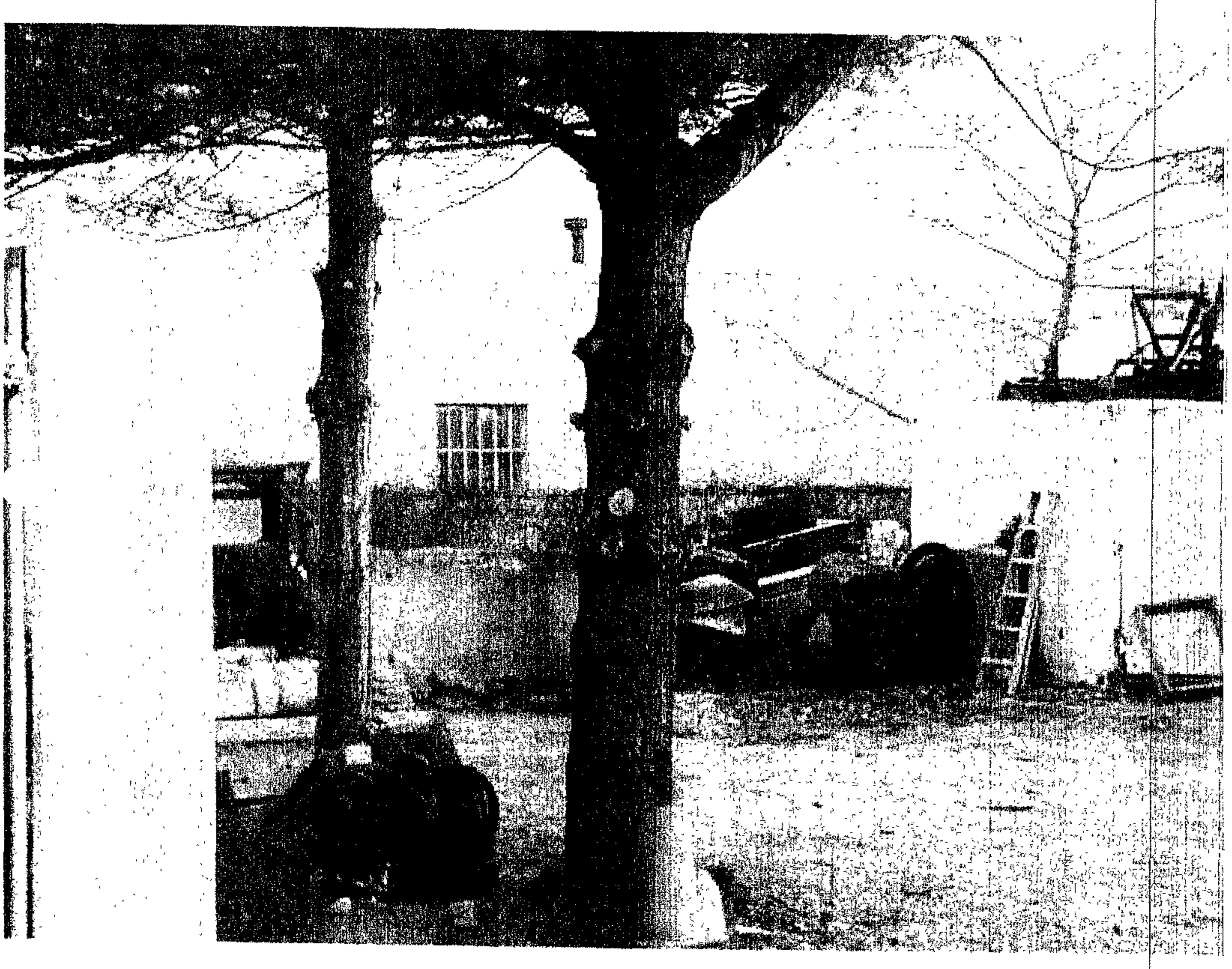

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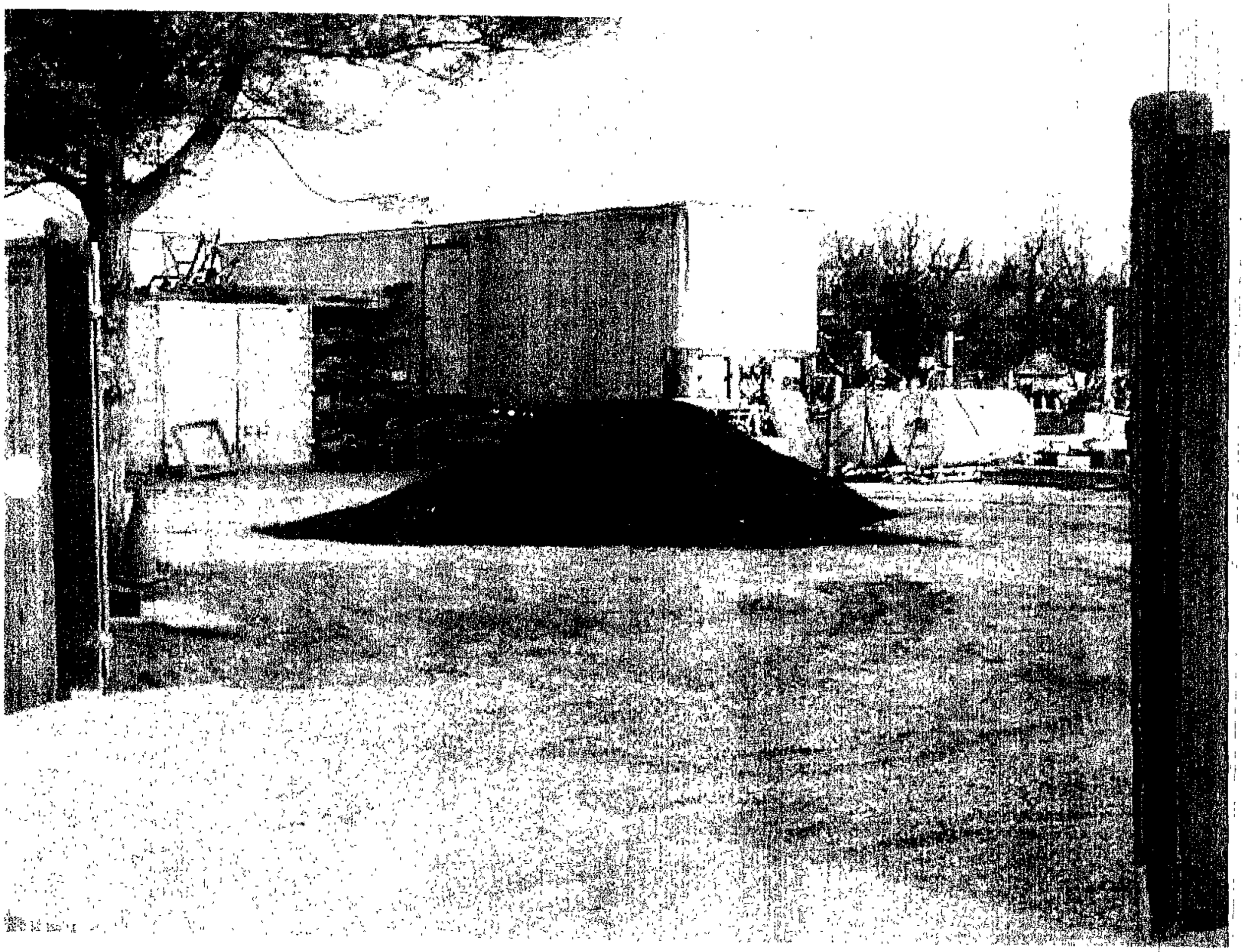

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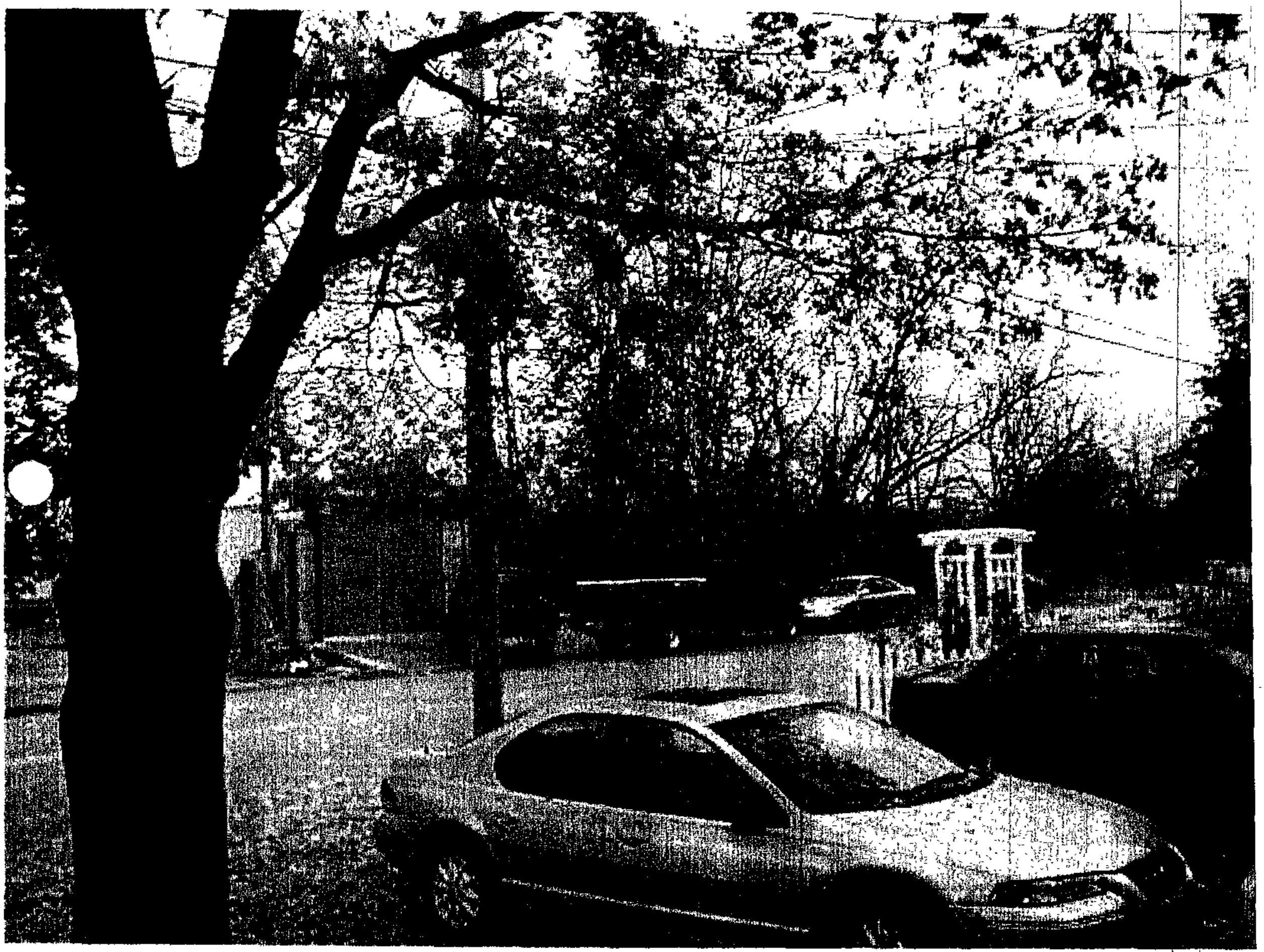

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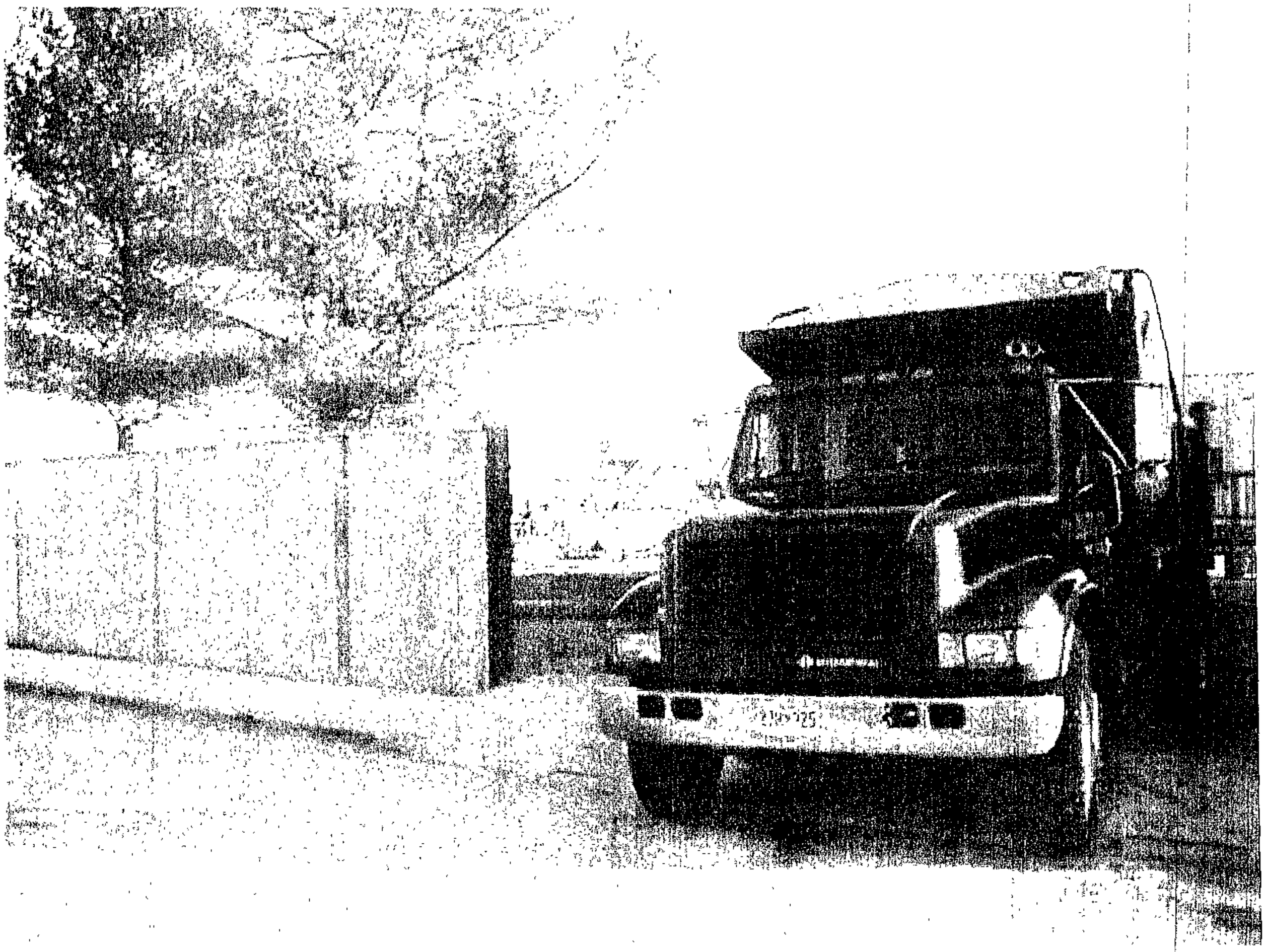

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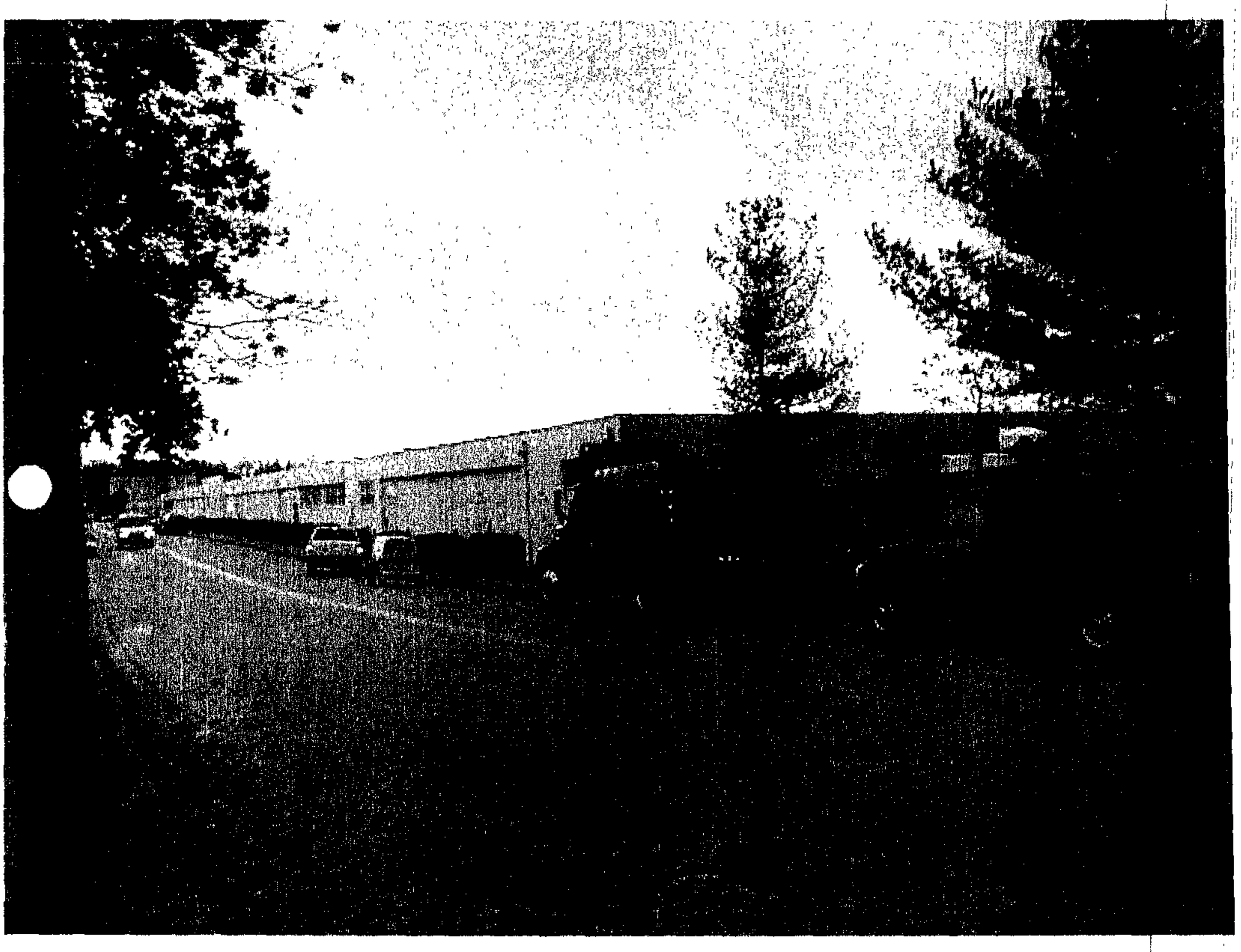

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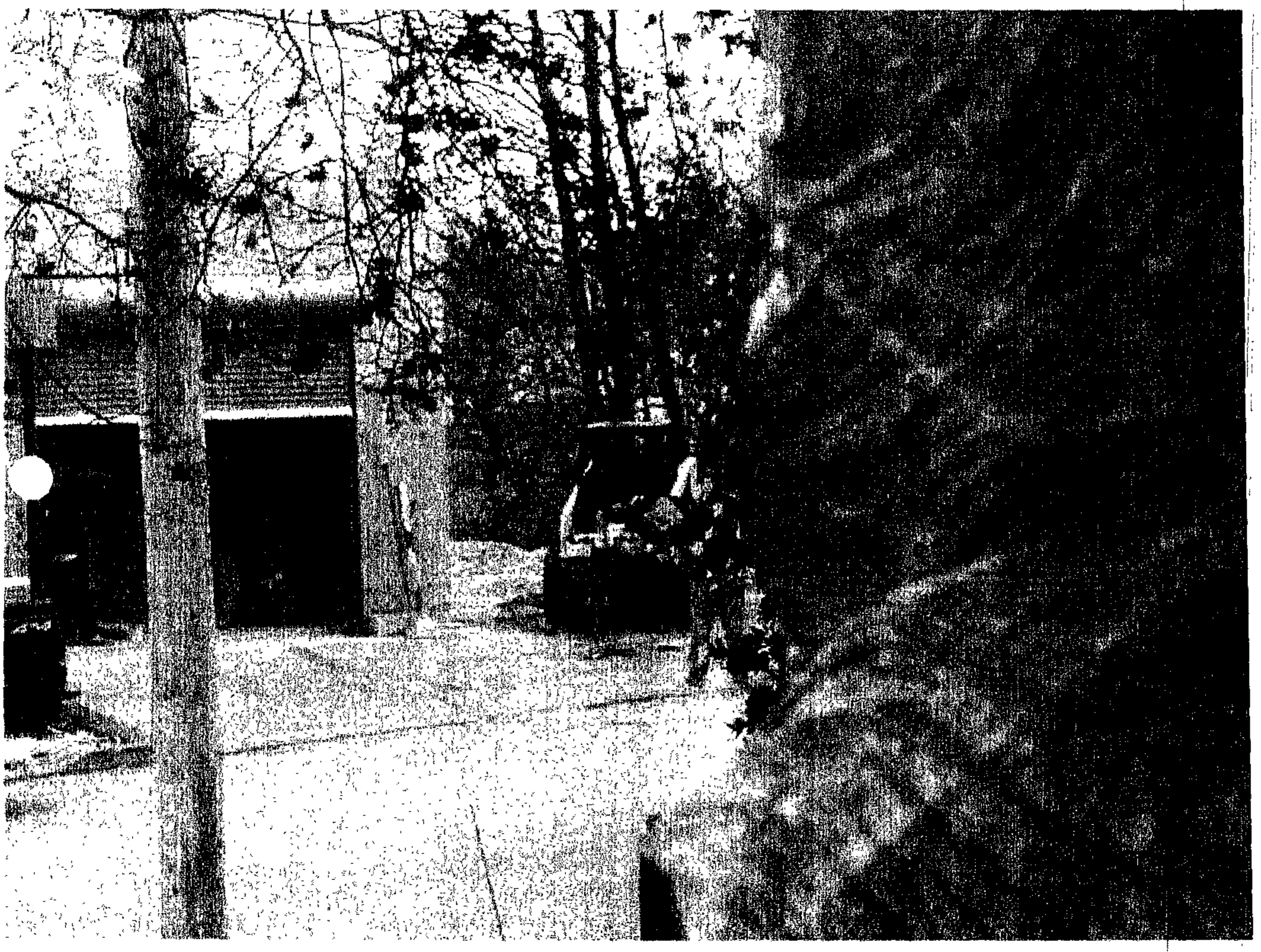

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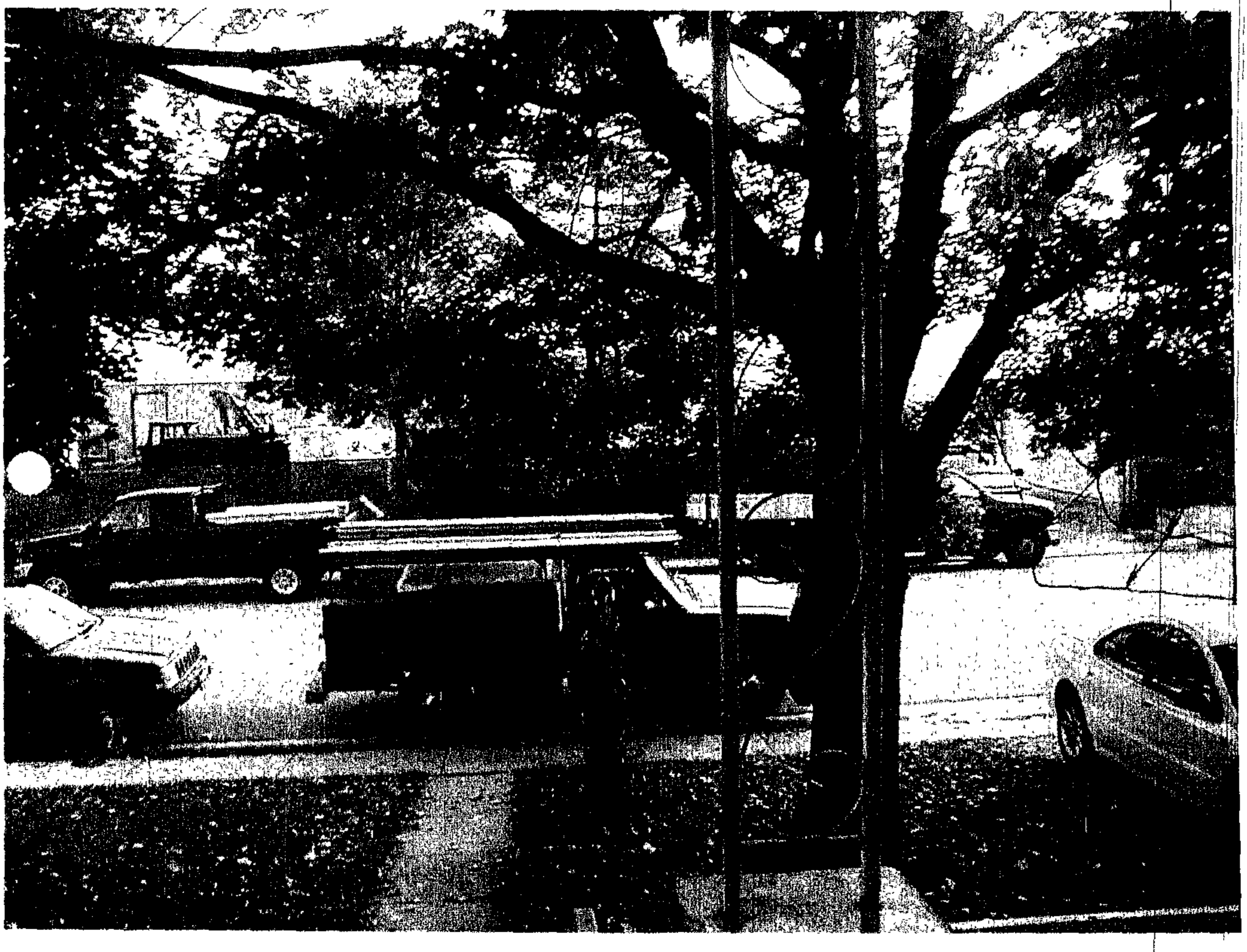

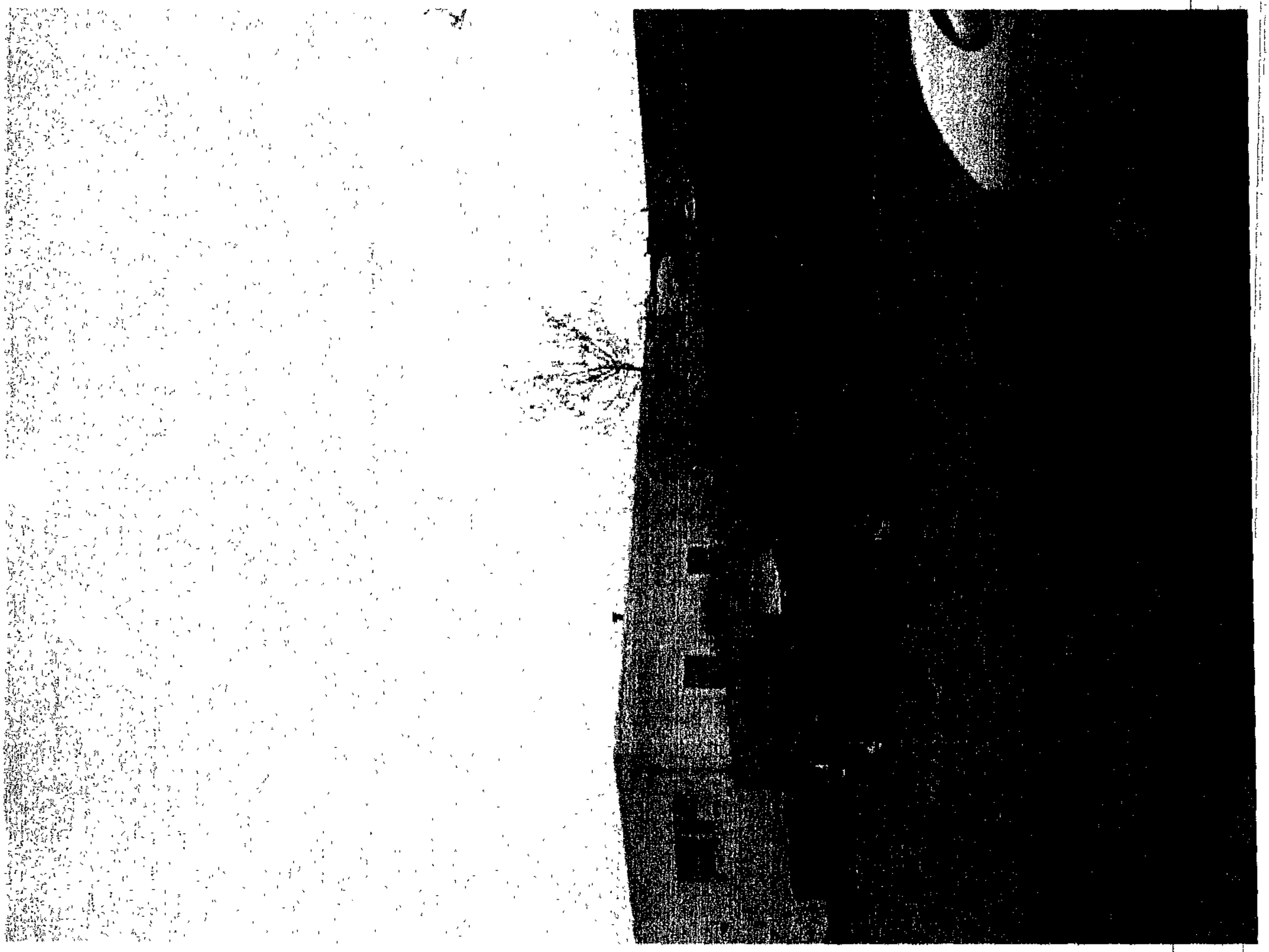

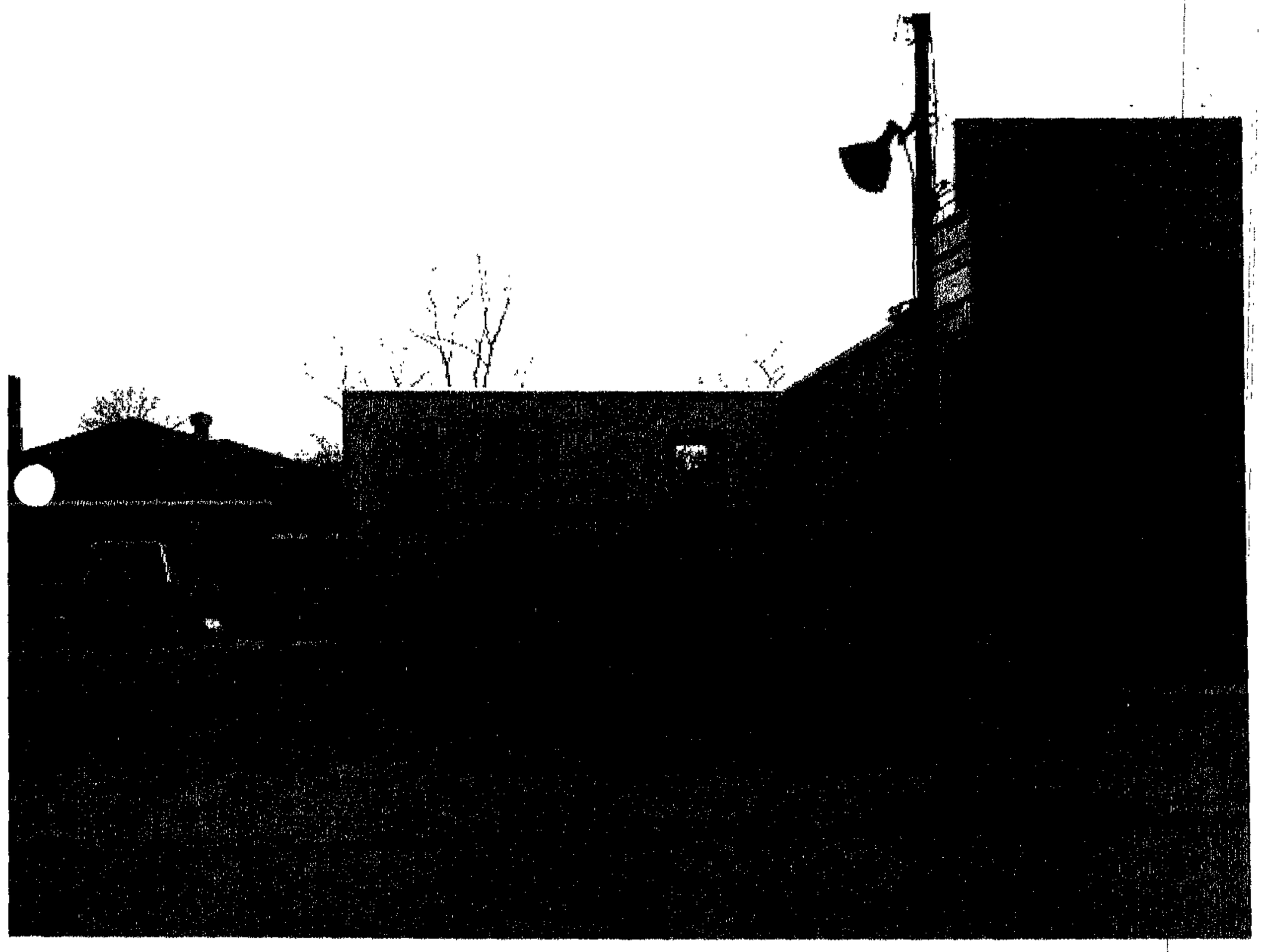

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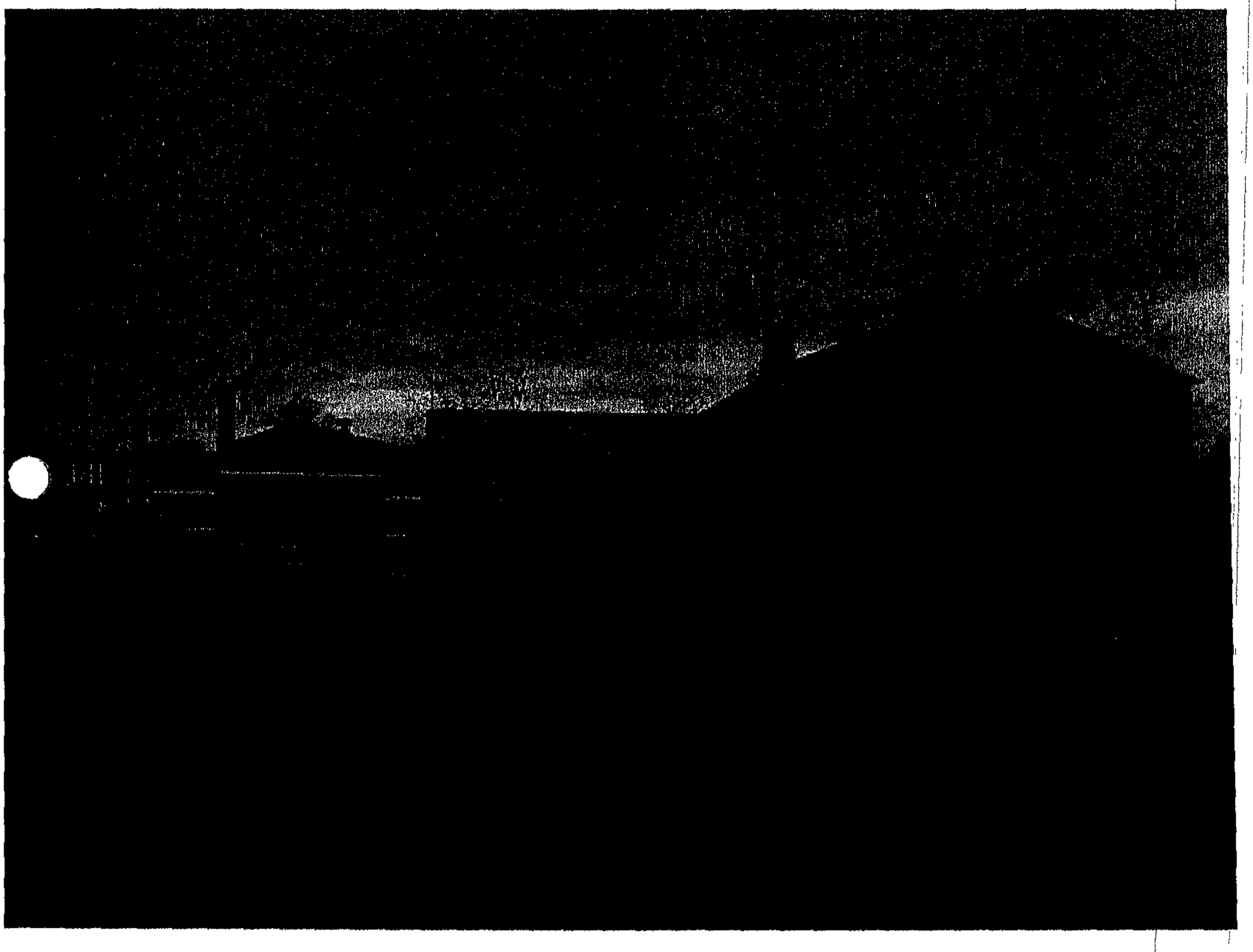

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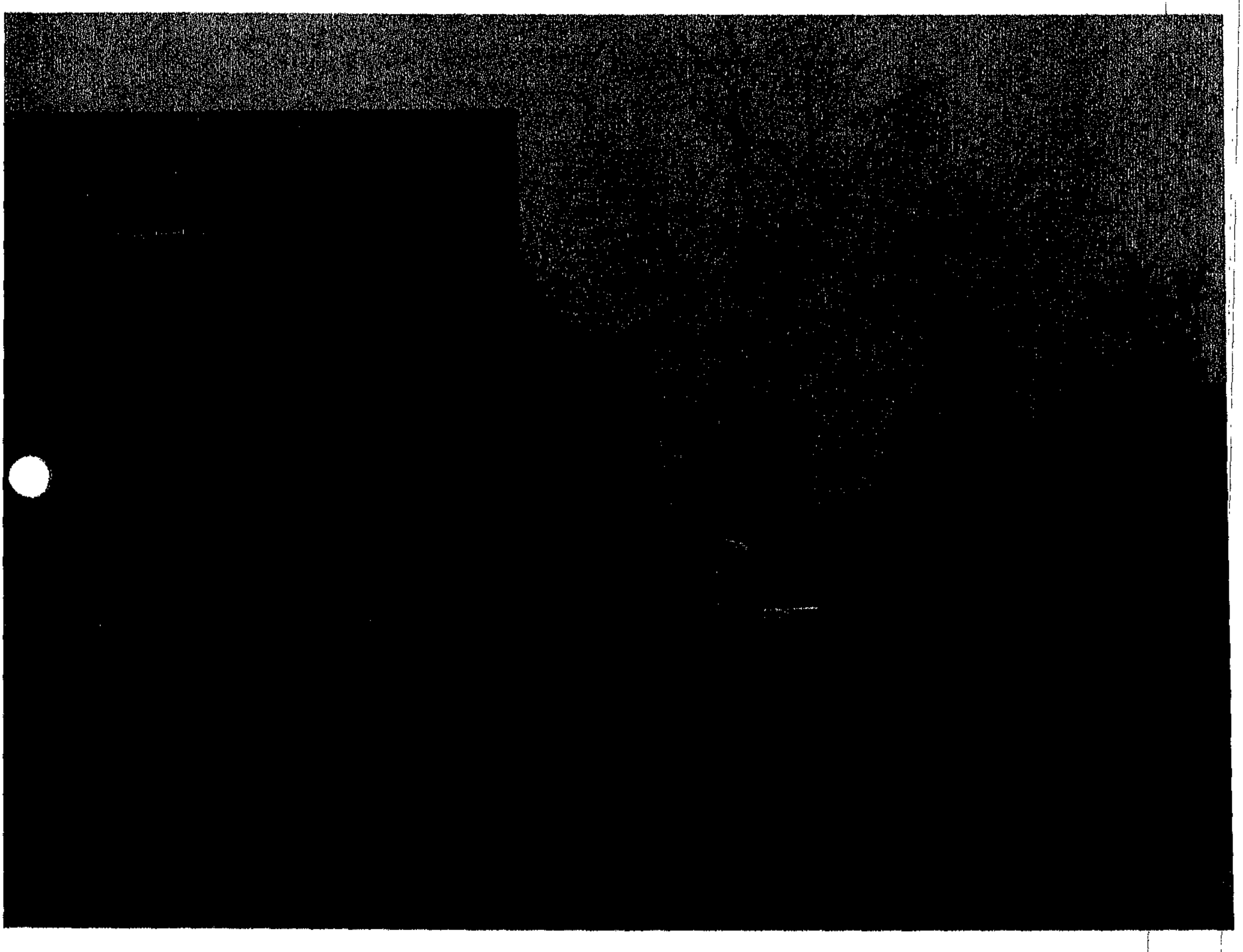

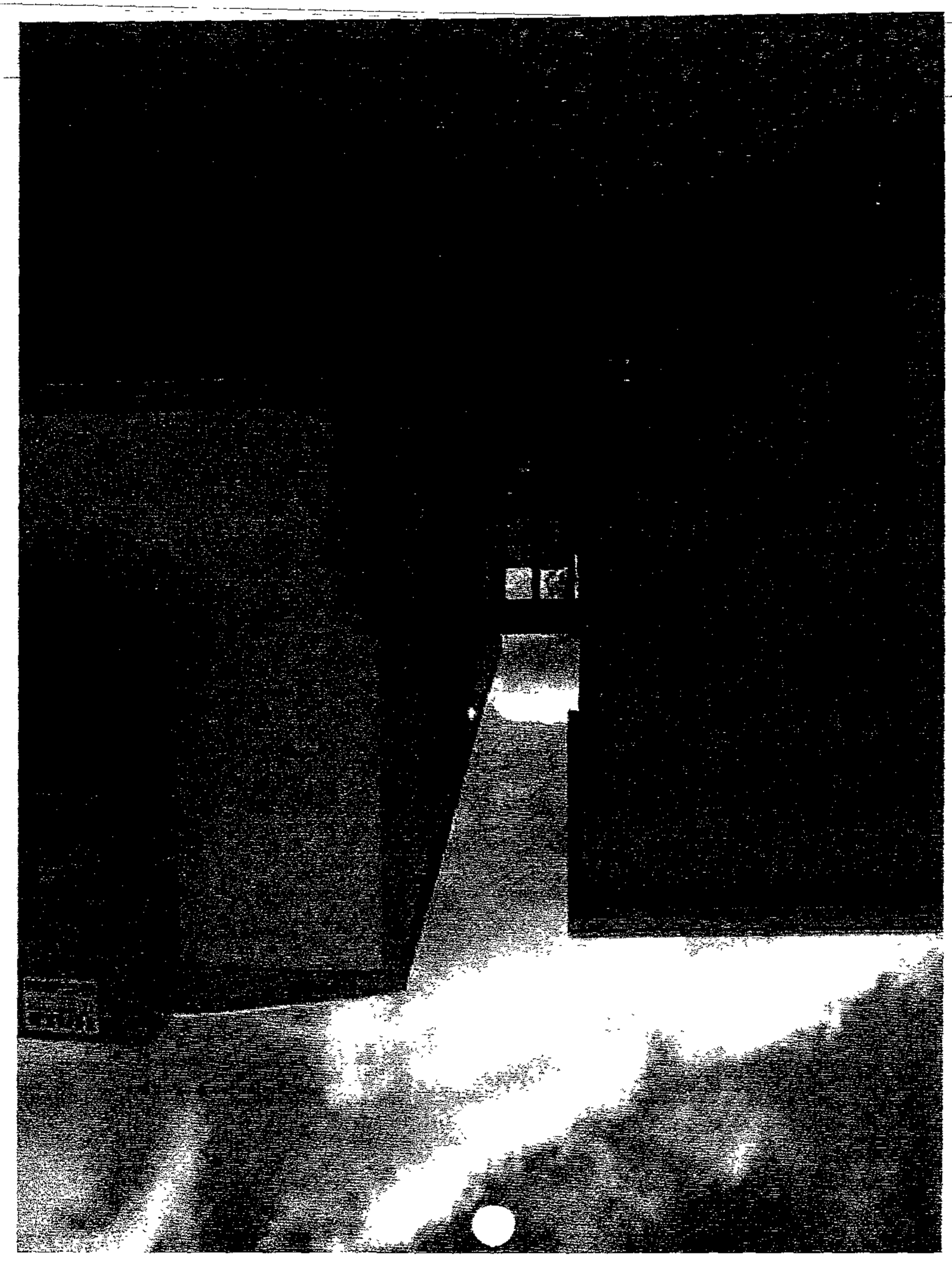

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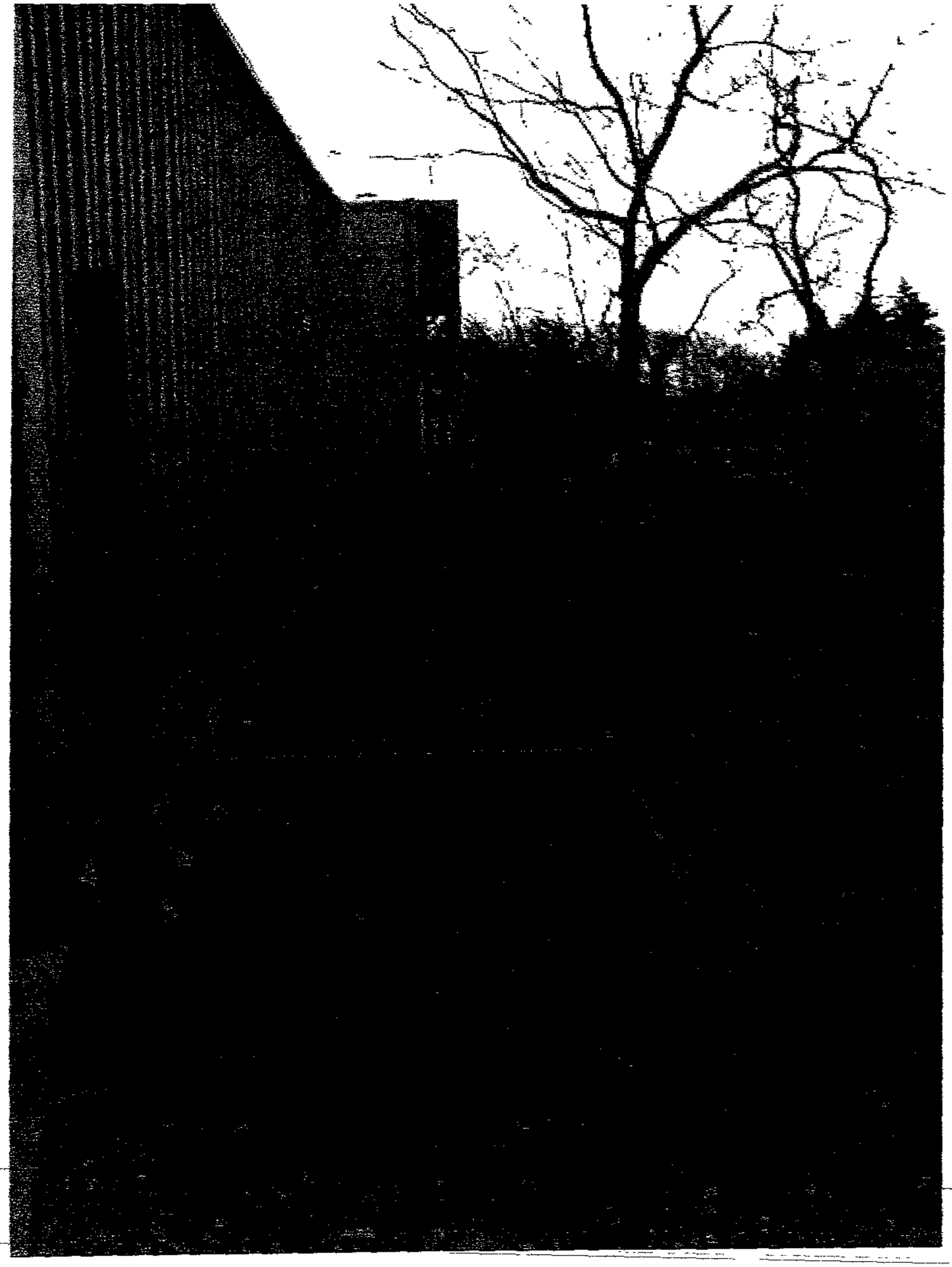
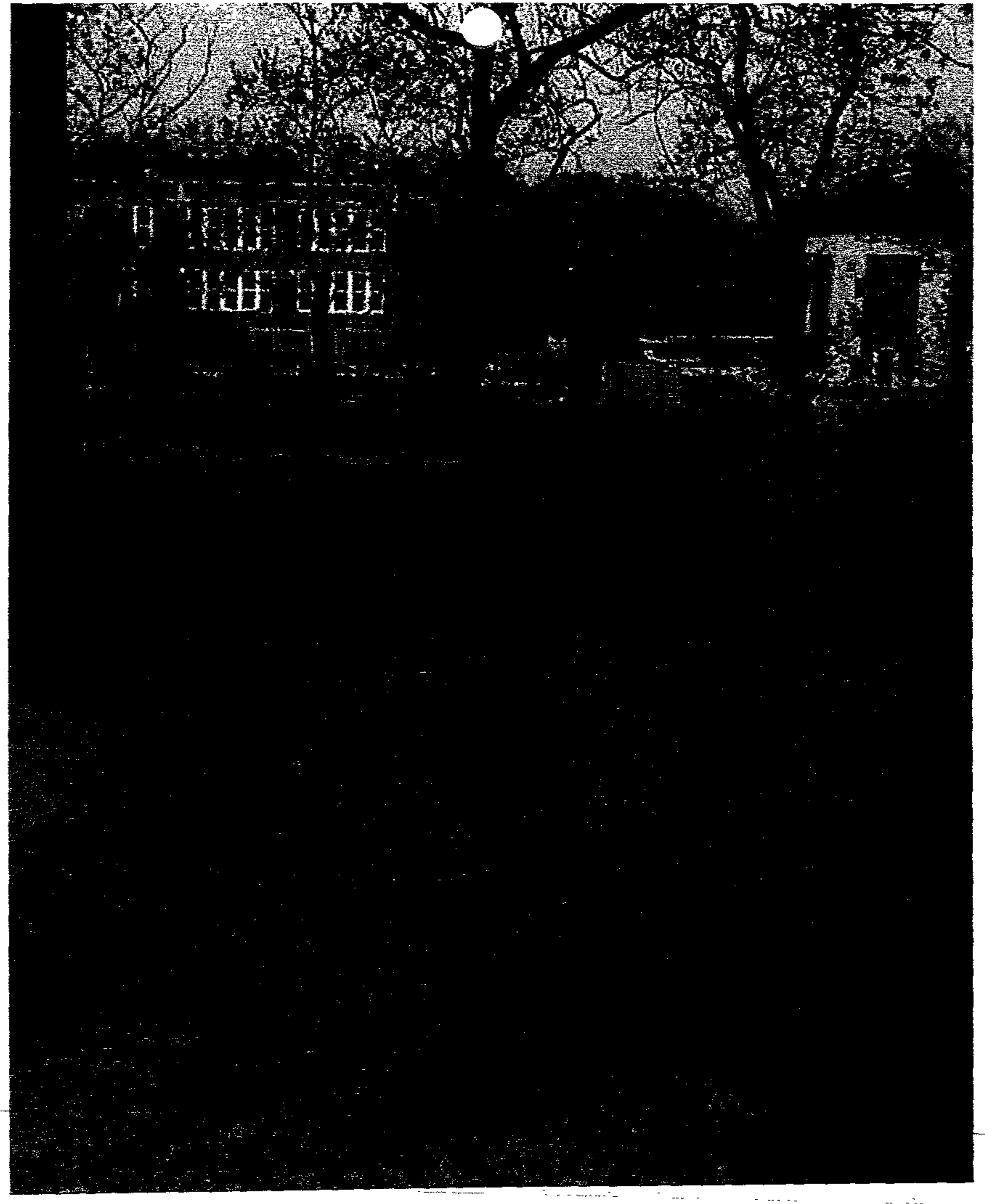
13E

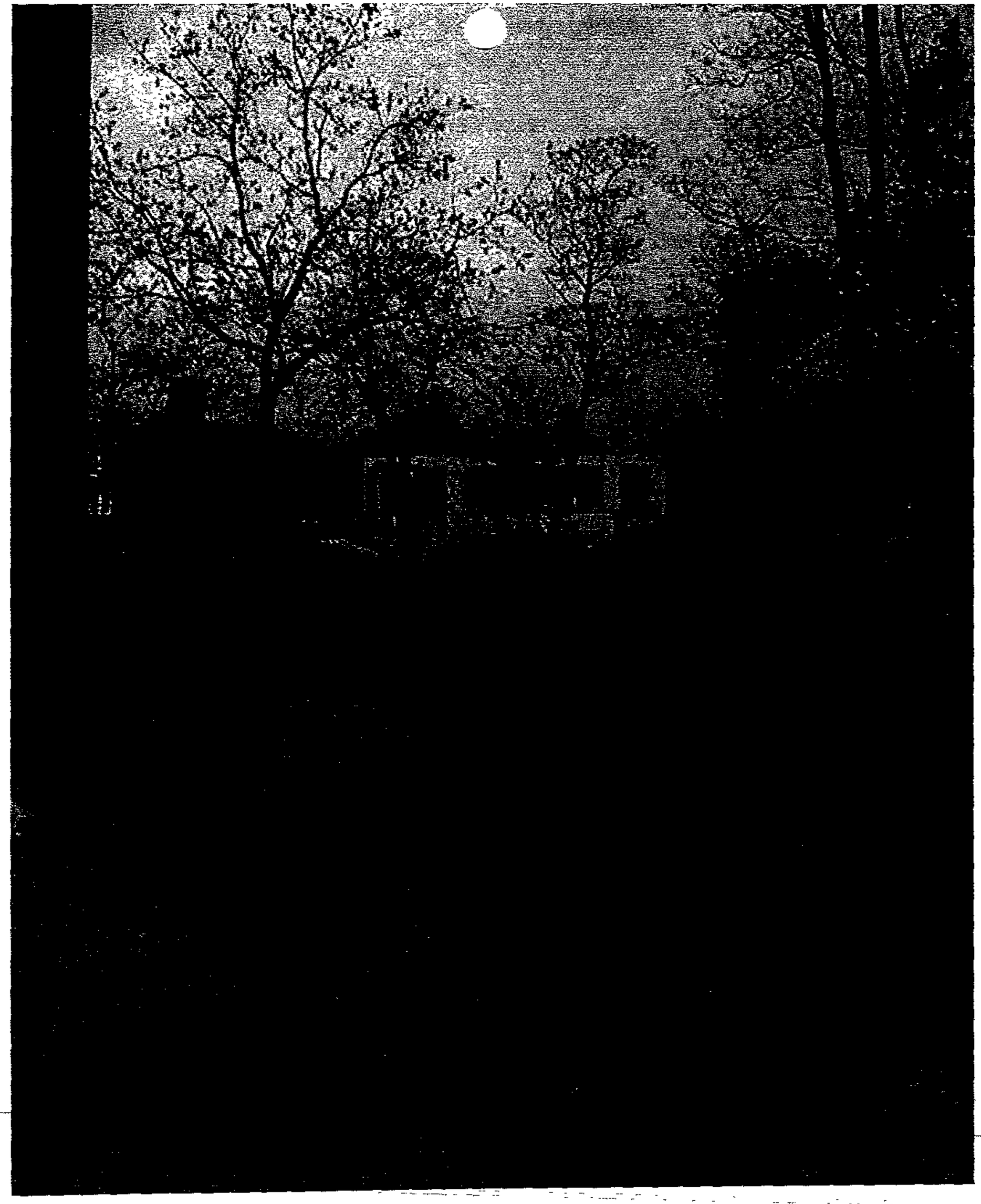


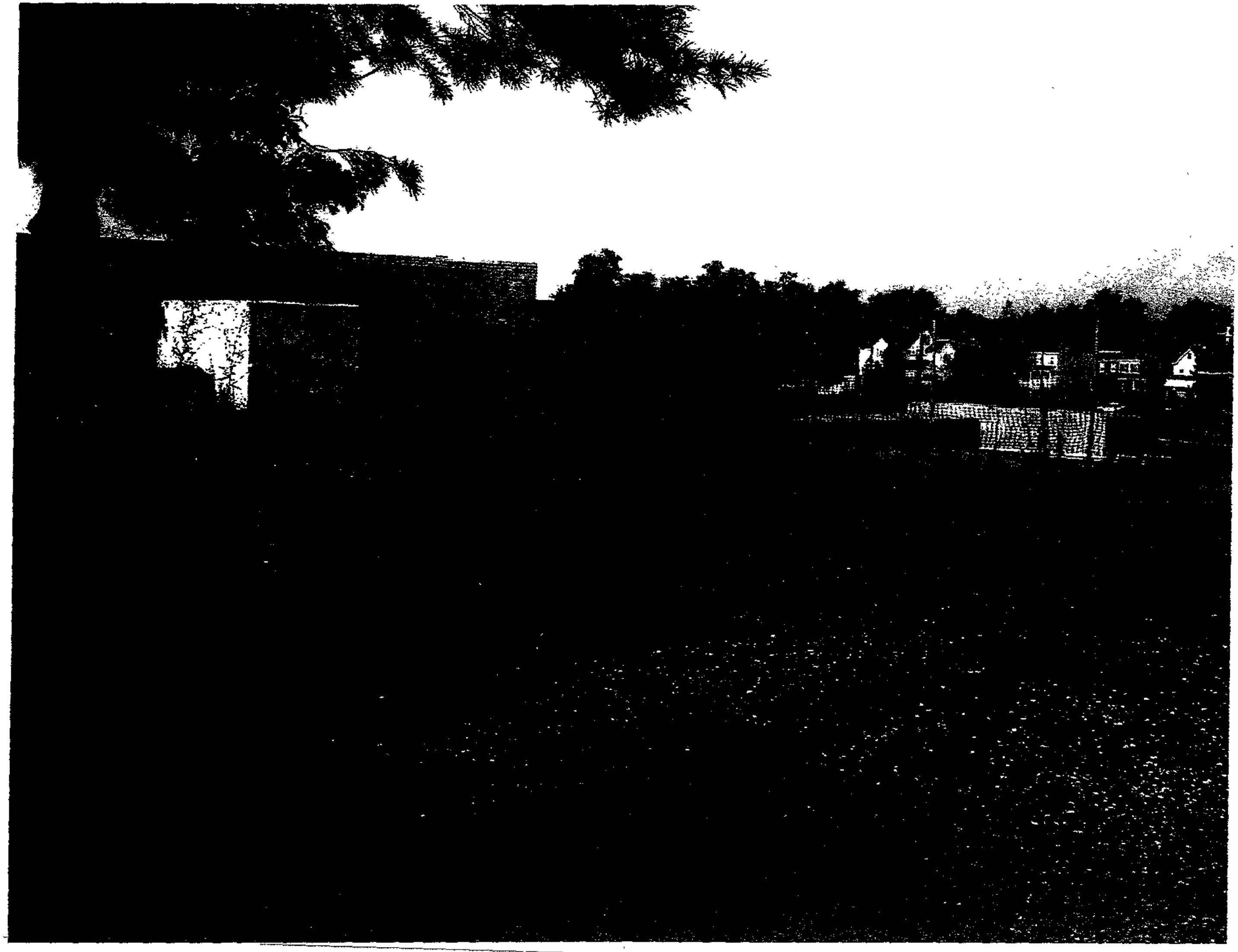
Da/
Winter
2001

13F

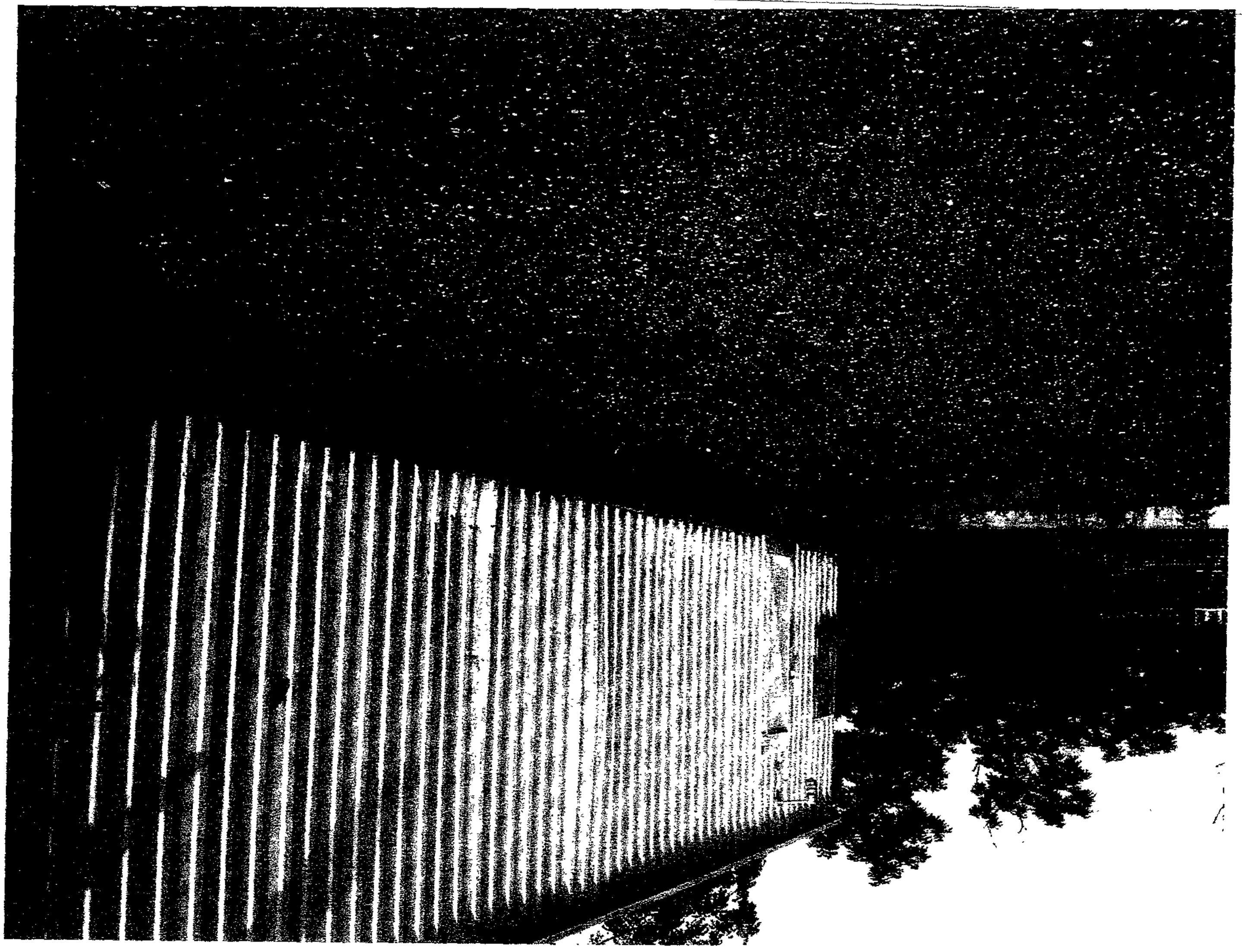


Fall
2002





159



13C

111 MELLOR AVE, CATONSVILLE, MD 21226
STATUS: ACTIVE
Ownership: Fee Simple, Sale
Legal Sub:
Adv Sub:
Project Name:
Lot-SF: 8370
Lot-Acres: 0.19
#Lvls: 1
Main Entrance:
Tax Map:
Comm/Ind. Type:
Location:
Basement: NO
Parking: On-site Prk/Sale, Prk Space Cnvys
Heat: Hot Water, Electric
Cool: None, None
TV/Cable/Comm:
Load:
Clear Span Ceiling Height:
Extra Unit Description: Professional Off
COMM/IND MISC:
INTERIOR: ,
EXTERIOR: Alum/Steel Siding, Brick, Concrete/Block, Shingle-Asphalt

Oth Fee: /mo pd
Lot/Block/Square:
Gross SF: 1200
Net SF: 1000
FAR:
Parcel: 1983

PRICE/SF: $
CAM: $
C/C FEE:
TAXES: $194
Tax Year: 2001
Tax ID#: 04010113200001
Zoning: BM
Liber:

LIST PRICE: $190,000
Classification: Commercial
List Type: Excl. Right
Old Map: 41E03
TBM Map: 0000

Area: N/A
Age:
Year Built: 0
Occupied: NO
Folio:

#Garage/Carport Spaces: /
#Assigned Spaces:

Hot Water: Electric
Water: Public
Sewer/Septic: Public Sewer
Door Hgt Drive-in:
Number of OHD:

REMARKS: CONTRACTORS YARD WITH A LARGE GARAGE AND OFFICE SPACE. ALL ZONING CONFIRMED. IMMEDIATE POSSESSION. LARGE PARKING AREA. ROOM FOR ADDITIONAL BUILDING. ORIGINAL BUILDING CAN BE MODIFIED. CURRENT ZONING IS "BM." SQ. FT. ESTIMATED. CALL MARY JANE FOR MORE INFORMATION. 410-418-8140.
DIRECTIONS: BELTWAY 695 WEST ON FREDERICK ROAD TO LEFT ON MELLOR.
Broker: LONG & FOSTER REAL ESTATE, INC.

Brkr Code: LNG45

Brkr Office: (410)461-1456
Brkr Fax: (410)750-8781

Listing Agent: MARY JANE MACGILL

Agt Office: (410)461-1456
Pager: (410)748-0148
Home: (410)247-0299
Cell: (443)506-0461

Show Instructions: Call Office
Owner(s): XXXX XXXX
Showing Contact(s): LONG/FOSTER LONG & FOSTER

H: (000)000-0000
H: (410)461-1456
DOM-MLS: 1
DOM-PROP: 1

O: (000)000-0000
O: (410)461-1456
SubComp: 3.0
BuyComp: 3.0
Add'l:

List Date: 18-SEP-2002
Update Date: 18-SEP-2002
Update Type: New
Disclosures:
Documents:
Cur Finance Type:
New Finance Types:

Orig Price: $190,000
Prior Price:

Property Condition:
Possession:

Dual: Y
DesR:
VarC: N

WATER
Water Oriented: N
Phys Dock Conveys: N
Vacation Prop: NO

Water Access: N
Nav Water:

Water View: N

Waterfront: N

© 2001 Metropolitan Regional Information Systems, Inc.:
Information is believed to be accurate, but should not be relied upon without verification.

Pat
16

Baltimore County
Department of Permits and
Development Management

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
pdmlandacq@co.ba.md.us

May 30, 2003

Michael P. Tanczyn
606 Baltimore Avenue, Ste. 106
Towson, MD 21204

Dear Mr. Tanczyn:

RE: Case Number: 03-456-SPH, 111 Mellor Avenue

The above referenced petition was accepted for processing by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on April 2, 2003.

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

W. Carl Richards, Jr.
Supervisor, Zoning Review

WCR:klm

Enclosures

c: People's Counsel
D.A. Drenner Concrete, Inc., 111 Mellor Avenue, Catonsville 21228
Linda Amos, 110 Melrose Avenue, Catonsville 21228
Susanne Gigliotti, 108 Mellor Avenue, Catonsville 21228

Printed with Soybean Ink
on Recycled Paper

Department of Permits and Development Management

Director's Office
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204
Tel: 410-887-3353 • Fax: 410-887-5708

Baltimore County

James T. Smith, Jr., County Executive
Timothy M. Kotroco, Director

November 4, 2003

Michael Tanczyn
606 Baltimore Avenue, Ste. 106
Towson, MD 21204

Dear Mr. Tanczyn:

RE: Case :03-456-SPH, 111 Mellor Avenue

Please be advised that an appeal of the above-referenced case was filed in this office on October 10, 2003, by Benjamin Bronstein. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals (Board).

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to call the Board at 410-887-3180.

Sincerely,

Timothy Kotroco

Timothy Kotroco
Director

TK:klm

c: Lawrence E. Schmidt, Zoning Commissioner
Timothy Kotroco, Director of PDM
People's Counsel
DA Drenner, 111 Mellor Ave., Catonsville 21228
Linda Amos, 110 Mellor Ave., Catonsville 21228
Susanne Gigliotti, 108 Mellor Ave., Catonsville 21228
Benjamin Bronstein, 29 W. Susquehanna Avenue, Ste. 205, Towson 21204

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APPEAL

Petition for Special Hearing
111 Mellor Avenue
N/e side Mellor Ave., 1,383' s of the c/l of Frederick Rd.
1st Election District – 1st Councilmanic District
D.A. Drenner Concrete – Legal Owner
Linda Amos, Susanne Gigliotti - Petitioners

Case No.: 03-456-SPH

Petition for Special Hearing (April 2, 2003)

Zoning Description of Property

Notice of Zoning Hearing (April 14, 2003)

Certification of Publication (May 20, 2003)

Certificate of Posting (May 15, 2003) by Garland Moore

Entry of Appearance by People's Counsel (April 16, 2003)

Petitioner(s) Sign-In Sheet
One Sheet

Protestant(s) Sign-In Sheet
None

Citizen(s) Sign-In Sheet
One Sheet

Zoning Advisory Committee Comments

Petitioners' Exhibit
1. Petition for Zoning Re-classification
2. Lease Agreement (Oct. 25, 1990)
3. Lease Agreement (Aug. 3, 1993)
4. Special Warranty Deed
5. Deed
6. Plat to accompany Petition for Special Hearing
7a.-c. Photos
8. Photo
9.a.-b. Photos
10. Letter from Frederick Grant of Dept. of Law
11a.-d. Photos (Fall 1999)
12a-p. Photos (Fall 2001)
13a-f. Photos
14a-b. Photos
15a-c. Photos
16. Metropolitan Regional Information Systems, Inc., Short Listing
17. Photo

Protestants' Exhibits:
None

Miscellaneous Exhibits (Marked as Prop. Owner):
1. Right to sell Listing Contract
2. Final Order of Code Enforcement Hearing Officer
3. Final Order of Code Official
4. Deed
5. Fixed Capital Record
6a. Letter from Howard Chertkof of Commercial and Industrial Realtor
6b. Letter from Francis Kuchta
7. Memorandum of Petitioners Linda Amos and Susanne Gigliotti

Zoning Commissioner's Order (GRANTED – September 30, 2003)

Notice of Appeal received on October 10, 2003 from Benjamin Bronstein

c: People's Counsel of Baltimore County, MS #2010
Zoning Commissioner/Deputy Zoning Commissioner
Timothy Kotroco, Director of PDM
Michael Tanczyn, 606 Baltimore Ave., Ste. 106, Towson 21204
DA Drenner, 111 Mellor Ave., Catonsville 21228
Linda Amos, 110 Mellor Ave., Catonsville 21228
Susanne Gigliotti, 108 Mellor Ave., Catonsville 21228

date sent November 4, 2003 klm

Baltimore County
Zoning Commissioner

Suite 405, County Courts Bldg.
401 Bosley Avenue
Towson, Maryland 21204
410-887-4386
Fax: 410-887-3468

June 20, 2003

Michael P. Tanczyn, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204

RE: PETITION FOR SPECIAL HEARING
111 Mellor Avenue
D. A. Drenner Concrete, Inc., Legal Owners; Linda J. Amos & Susanne Gigliotti, Petitioners
Case No. 03-456-SPH

Dear Mr. Tanczyn:

This letter is to confirm that the above-captioned matter, which was scheduled for a public hearing on Wednesday, July 9, 2003, has been postponed at your request due the unavailability of a key witness. By agreement of all parties, the matter has been rescheduled for Wednesday, August 13, 2003 at 9:00 AM in the Circuit Courts Building.

In the meantime, should anyone have any questions, please do not hesitate to call me.

Very truly yours,

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

cc: Ms. Linda J. Amos, 110 Melrose Avenue, Catonsville, Md. 21228
Ms. Susanne Gigliotti, 108 Mellor Avenue, Catonsville, Md. 21228
D. A. Drenner Concrete, Inc., 111 Mellor Avenue, Catonsville, Md. 21228
Benjamin Bronstein, Esquire, 29 W. Susquehanna Avenue, Suite 205, Towson, Md. 21204
People's Counsel; Case File

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on Recycled Paper

LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

June 18, 2003

RECEIVED
JUN 19 2003
ZONING COMMISSIONER

VIA FACSIMILE
AND FIRST CLASS MAIL
Lawrence E. Schmidt
Zoning Commissioner
for Baltimore County
Suite 405
County Courts Bldg.
Towson, Maryland 21204

Re: 111 Mellor Avenue: Case No. 00-1503: Code Enforcement

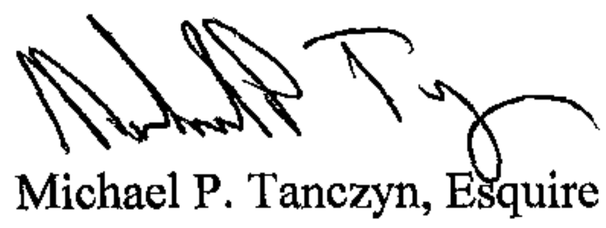
Dear Mr. Schmidt:

In partial response to Mr. Bronstein's request for a proffer by our witness, who will be out of state for the month of July, his name if James Bossert. He has continuously resided, since the 1960's, at 88 Mellor Avenue, in the same block and across the street from the property which is the subject of the Petition. He has had frequent observations of the use of the site, and would testify that Baltimore City made no use of the site as a contractor's equipment storage yard, beginning sometime in the mid-1980's. He has reviewed the leases for the two proprietary tenants the City rented the property to, beginning in the 1990's, the first of which did not use the property at all for a contractor's equipment storage yard, and the second was the Drenner entity, as a tenant who used the property for its business. He is aware that Drenner subsequently purchased the property for approximately twelve or thirteen thousand dollars by Deed, and that Drenner expanded the original area by encroaching with its trucks on the National Guard property adjacent thereto, and on residentially zoned land. He would testify that there was an abandonment of the use by the City and by the proprietary lease to a tenant who did not use if for a contractor's equipment storage yard for more than the statutory period of one year. Mr. Bossert is corroborative of another witness who has not lived in the community quite as long, who would testify as to the same items mentioned in this letter and more.

I would, therefore, renew our request for a continuance. As you know, the matter had to be postponed because of the non-availability of a Deputy Zoning Commissioner, who was scheduled to hear this, who had been confirmed to be the Director of Permits and Development Management. We were ready, as the Petitioners, to appear and present our case on the date originally scheduled, and this simply is a matter that the postponement was unavoidable, and we would therefore ask, if the continuance is granted, that it be rescheduled for the second or third week in August, if a date is available at that time.

We look forward to hearing back from you. We have not re-advertised, in the hope that if this continuance is granted, we will not incur another expense for that. Our deadline to get it posted will begin to run next week, so we would appreciate your assistance in deciding on our postponement request.

Very truly yours,



Michael P. Tanczyn, Esquire

MPT/cbl
cc: Suzanne Gigliotti (via facsimile)
Linda Amos (via facsimile)
Benjamin Bronstein, Esquire (via facsimile and first-class mail)

BENJAMIN BRONSTEIN
ATTORNEY AT LAW
SUSQUEHANNA BUILDING, SUITE 205
29 WEST SUSQUEHANNA AVENUE
TOWSON, MARYLAND 21204
(410) 296-0200
FAX: (410) 296-3719
Benbronstein@aol.com

RECEIVED
JUN 12 2003
ZONING COMMISSIONER

June 11, 2003

The Honorable Lawrence E. Schmidt
Zoning Commissioner for Baltimore County
County Courts Building - Suite 405
401 Bosley Avenue
Towson, Maryland 21204

RE: 111 Mellor Avenue
Case No.: 03-456-SPH

Dear Commissioner Schmidt:

I have a copy of a letter dated June 9, 2003 over the signature of Michael P. Tanczyn, Esquire, pertaining to 111 Mellor Avenue, case no.: 00-1503: Code Enforcement. I presume that Mr. Tanczyn is referring to a Petition for Special Hearing filed by him in case no.: 03-456-SPH. I represent D.A. Drenner Concrete, Inc., the owner of the property. My client would much prefer to proceed to a hearing on July 9, 2003 since the closing of a sale of the property is being held up because of this case. The Petitioners have systematically attempted to harass potential buyers of this property as well as my client.

I would oppose the request for postponement without a proffer of the name and the nature of the testimony of the witness.

In the event you deem it necessary to grant the postponement, I respectfully request that you continue to the second or third week in August, excluding August 15 or 21.

Thank you for your kind consideration.

Very truly yours,

Benjamin Bronstein

BB/mlh

cc: Michael P. Tanczyn, Esquire
Mr. Darrel Drenner, President
D.A. Drenner Concrete, Inc.

Baltimore County
Zoning Commissioner

Suite 405, County Courts Bldg.
401 Bosley Avenue
Towson, Maryland 21204
410-887-4386
Fax: 410-887-3468

June 4, 2003

Michael P. Tanczyn, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204

RE: PETITION FOR SPECIAL HEARING
111 Mellor Avenue
D. A. Drenner Concrete, Inc., Legal Owners; Linda J. Amos & Susanne Gigliotti, Petitioners
Case No. 03-456-SPH

Dear Mr. Tanczyn:

This letter is to confirm that the above-captioned matter, which was to be heard on Thursday, June 5, 2003, was postponed at my request due to a scheduling conflict. By agreement of all parties, the matter has been rescheduled for Wednesday, July 9, 2003 at 9:00 AM in Room 407 of the Circuit Courts Building. All parties to the case will be notified by copy of this letter; however, please arrange to have the property re-posted with a new sign to advise the general public of the new hearing date, time and location. Thank you for your cooperation in this matter.

Very truly yours,

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

cc: Ms. Linda J. Amos, 110 Melrose Avenue, Catonsville, Md. 21228
Ms. Susanne Gigliotti, 108 Mellor Avenue, Catonsville, Md. 21228
D. A. Drenner Concrete, Inc., 111 Mellor Avenue, Catonsville, Md. 21228
Benjamin Bronstein, Esquire, 29 W. Susquehanna Avenue, Suite 205, Towson, Md. 21204
People's Counsel; Case File

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LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

June 9, 2003

RECEIVED
JUN 10 2003
ZONING COMMISSIONER

Lawrence E. Schmidt
Zoning Commissioner
for Baltimore County
Suite 405
County Courts Bldg.
Towson, Maryland 21204

Re: 111 Mellor Avenue: Case No. 00-1503: Code Enforcement

Dear Mr. Schmidt:

Thanks for your letter regarding the re-posting of the above-mentioned property. Regarding the July 9 hearing date, when my client checked with her witnesses, she was advised that one of the key witnesses will be out of state for the entire month of July. This letter serves to respectfully request that the hearing be postponed to the soonest available date in the 2nd or 3rd week of August.

By way of copy of this letter to Benjamin Bronstein, Esquire, we are asking that he contact us to advise of his availability, at which time I will coordinate with your office.

Thank you for your consideration of this request. Please feel free to contact me should you have any questions.

Very truly yours,

Michael P. Tanczyn, Esquire

MPT/cbl

cc: Suzanne Gigliotti
Linda Amos
Benjamin Bronstein, Esquire

LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

3/28/03
JP
8

March 28, 2003

VIA HAND-DELIVERY
Arnold Jablon
Director
Baltimore County Department of Permits
and Development Management
Attn: Mr. Jeff Perlow
County Office Building
111 West Chesapeake Avenue
Towson, MD 21204

Re: 111 Mellor Avenue

Dear Mr. Jablon and Mr. Perlow:

Per my conversation with Mr. Perlow, I am supplementing our letter of March 17, 2003 to include the note that Reclass Case 2800, decided January 13,1954, dealt with a request by the Petitioner for reclassification from an A resident zone to an F light industrial zone. The Zoning Commissioner for Baltimore County, who was then empowered to grant reclassification of zoning, did not grant the relief requested, but rather granted the zoning from A resident zone to E commercial zone, by Order dated January 13, 1954. To further supplement my letter of March 17, 2003, none of the prior code enforcement actions noted in our March 17, 2003 letter, to the best of my knowledge, is either open or active, as of the time of filing.

Please advise us of the acceptance of the Petition and the Notice of Hearing, so that we can have it posted in accordance with the legal requirements. Please feel free to contact me should you have any questions.

Very truly yours,

Michael P. Tanczyn, Esquire

RECEIVED
MAR 28 2003
03-0872

MPT/cbl

cc: clients

03-456-SPH

LAW OFFICES
MICHAEL P. TANCZYN, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(410) 296-8823 • (410) 296-8824 • Fax: (410) 296-8827

3/21/03
LOCR
8

March 17, 2003

Arnold Jablon
Director
Baltimore County Department of Permits
and Development Management
County Office Building
111 West Chesapeake Avenue
Towson, MD 21204

Re: 111 Mellor Avenue: Case No. 00-1503: Code Enforcement

Dear Mr. Jablon:

Enclosed herewith for filing, you will find:

1. Twelve(12) Plats, folded to the required size;
2. Three (3) sealed Zoning Descriptions;
3. One (1) vicinity map excerpt from the 200 scale map, showing the site, as outlined;
4. Our check for costs.

This request for special hearing involves a property which has been the subject of numerous prior code enforcement actions, 9-2180, 00-1503, 00-0836, 01-4843, and 99-6305. We ask that this matter be set in for hearing, and that Notice of the hearing be sent to us, so that we can have it posted in accordance with the legal requirements.

Please feel free to contact me should you have any questions.

Very truly yours,

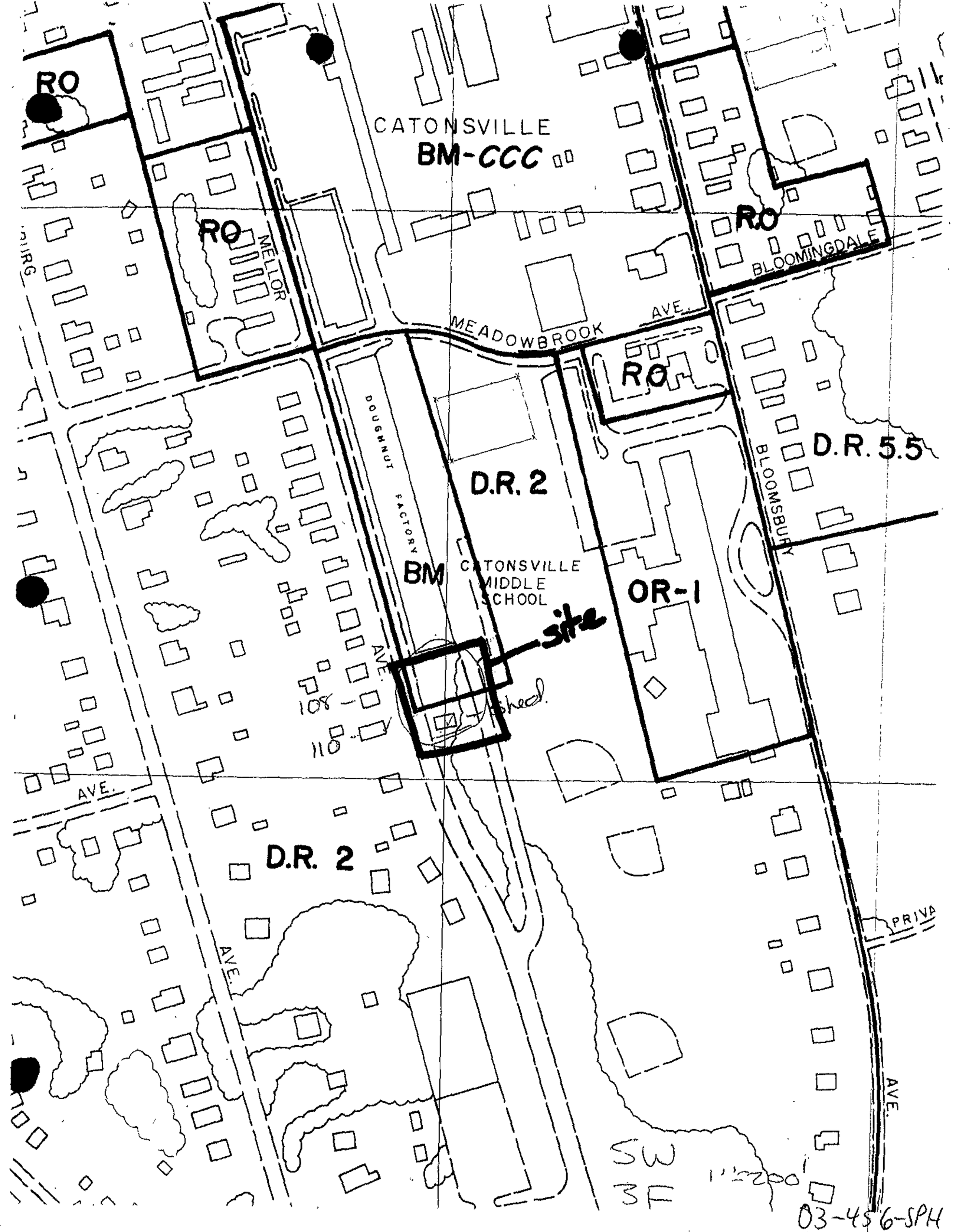
Michael P. Tanczyn, Esquire

MPT/cbl
Enclosure

cc: Suzanne Gigliotti
Linda Amos

RECEIVED
20 2003
03-0759

03-456-SPH


RO
CATONSVILLE
BM-CCC
RO
MELLOR
RO
BLOOMINGDALE
MEADOWBROOK
AVE.
RO
D.R. 5.5
DOUGHNUT
FACTORY
D.R. 2
BLOOMSBURY
BM
CATONSVILLE
MIDDLE
SCHOOL
OR-1
site
AVE.
108
110
shed
AVE.
D.R. 2
AVE.
PRIVA
AVE.
SW
3F
1"=200'

03-456-SPH

JNP
Intake Planner

3/25/03
Date Assigned

DROP-OFF PETITIONS
PROCESSING CHECK-OFF

☑ **Two Questions Answered on Cover Sheet:**
- ✓ Any previous reviews in the zoning office? Not Answered (Case # 2800 Jan 13, 1954) ✓
- ✓ Any current building or zoning violations on site? NO Not Answered

☑ **Petition Form Matches Plat in these areas:**
- Address ✓
- ✓ Zoning No – DR 2 Also ?
- ✓ Legal Owner(s) – ? Not Shown (Change Neighbors to Petitioner's)
- Contract Purchaser(s) – N/A
- Request (if listed on plat) N/A

☑ **Petition Form (must be current PDM form) is Complete:**
- Request:
  - ✓ Section Numbers ✓
  - ✓ Correct Wording (must relate to the code, especially floodplain and historical standard wording. Variances must include the request in lieu of the required code quantities.
  - ✓ Hardship/Practical Difficulty Reasons
- ✓ Legal Owner/Contract Purchaser: Not Shown (Change Neighbors to Petitioner's)
  - ✓ Signatures (originals) – Representative
  - ✓ Printed/Typed Name and Title (if company) – Not Shown
- ✓ Attorney (if incorporated)
- ✓ Signature/Address/Telephone Number of Attorney

☑ **Correct Number of Petition Forms, Descriptions and Plats**

☑ **200 Scale Zoning Map**

☑ **Check:** Amount Correct? Signed?

☑ **ZAC Plat Information:**
- Location (by Carl) NE/S Mellor Ave. 1383 S. Frederick Rd. (111 Mellor Ave.)
- Zoning: DR 2 & BM Acreage: .1921 Previous Hearing Listed With Decision ✓
- Election District 1 Councilmanic District 1 Case # 2800 Reclassified from "A" Residential to "B" Commercial 1/13/1954
- Check to See if the Subject Site or Request is:
  - CBCA – NO
  - Floodplain – NO
  - Elderly – NO
  - Historical – NO
  - Pawn Shop – NO
  - Helicopter – NO
  - *If Yes, Print Special Handling Category Here
  - *If No, Print No

NO

03-456-SPH
Item Number Assigned

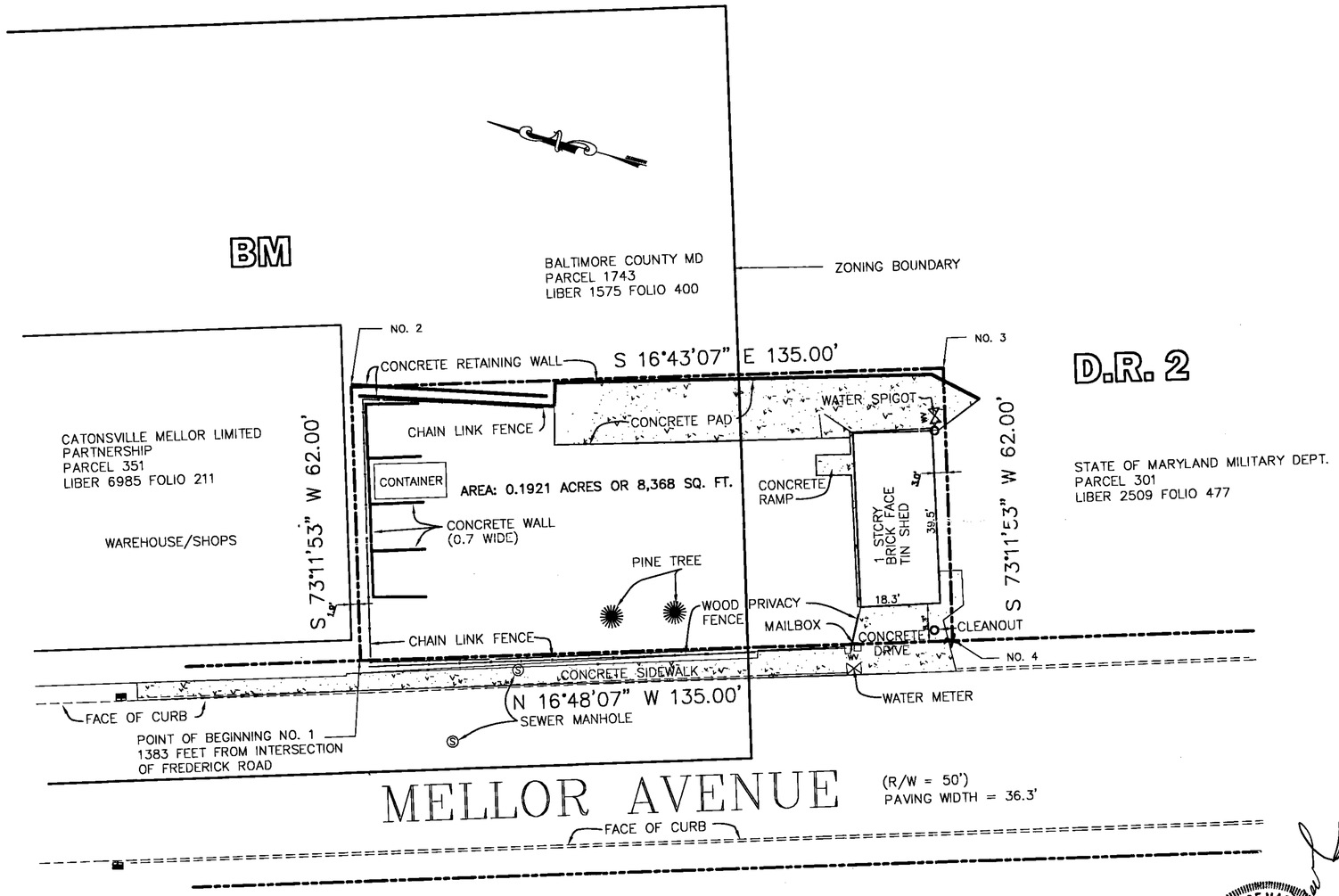
4/2/03
Date Accepted for Filing

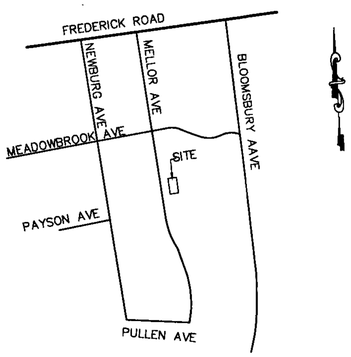
WCR/SCJ – 9/5/00

PLAT TO ACCOMPANY PETITION FOR ZONING ☐ VARIANCE ☒ SPECIAL HEARING

PROPERTY ADDRESS: 111 MELLOR AVENUE
CATONSVILLE, MARYLAND 21228

RECORDED IN LIBER 14361 AT FOLIO 556
OWNER: D A DRENNER CONCRETE INC.





VICINITY MAP
SCALE: 1"=1000'

LOCATION INFORMATION

ELECTION DISTRICT: 1

COUNCILMATIC DISTRICT: 1

1"=200' SCALE MAP # SW 3 F

ZONING: D.R. 2 & BM

PARCEL SIZE: 0.1921 ACREAGE 8,368 SQUARE FEET

	PUBLIC	PRIVATE
SEWER	☒	☐
WATER	☒	☐

	YES	NO
CHESAPEAKE BAY CRITICAL AREA	☐	☒
100 YEAR FLOOD PLAIN	☐	☒
HISTORIC PROPERTY/ BUILDING	☐	☒

PRIOR ZONING HEARING JAN.13,1954 #2800

ZONING OFFICE USE ONLY

REVIEWED BY	ITEM#	CASE#
JNP	456	03-456-SPH

STATE OF MARYLAND ERIK CONNELLY SYKES REGISTERED PROPERTY LINE SURVEYOR

PREPARED BY: **MARKS & ASSOCIATES L.L.C.**
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ELLICOTT CITY, MARYLAND 21043
PH. (410) 747-8738
FAX (410) 747-8739

SCALE OF DRAWING: 1"= 20'

DATE: DECEMBER 13, 2002