IN RE: PETITIONS FOR SPECIAL HEARING
AND VARIANCE
NE/S of Lafayette Avenue,
500' +/- NE Woodsdale Road
1st Election District
1st Councilmanic District
(Lafayette Avenue @ Lanvale Street)

* BEFORE THE

DEPUTY ZONING COMMISSIONER

* OF BALTIMORE COUNTY

* CASE NO. 03-598-SPHA

Brian G. Macari *Petitioner*

* * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner on a Petition for Variance and Petition for Special Hearing for the property located at Lafayette Avenue at Lanvale Street in the western area of Baltimore County. The Petition was filed by Brian G. Macari, the legal owner of the property. Special Hearing relief is requested to confirm a total of 3 residential dwellings on the property per the current Baltimore County Zoning Regulations; or, alternatively, grant the companion variance relief; and approve the amendment of any final development plan for "Catonsville Heights" consistent with the relief granted.

If the special hearing relief is not granted, a Variance Request is requested to permit 3 new homes on the property having lot widths less than the 55 ft. required, to approve a front yard setback of 25 ft., to approve the proposed configuration of lots of record and to permit a side yard setback on a corner lot of 15 ft.

The property was posted with Notice of Hearing on August 6, 2003, for 15 days prior to the hearing, in order to notify all interested citizens of the requested zoning relief. In addition, a Notice of Zoning hearing was published in "The Jeffersonian" newspaper on August 12, 2003 to notify any interested persons of the scheduled hearing date.

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Notice is taken that the property, which is the subject of these special hearing and variance requests, consists of 0.466 acres +/-, a/k/a Parcel #227, and is zoned D.R.5.5. The property is unimproved at this time.

Applicable Law

Section 500.7 of the B.C.Z.R. Special Hearings

The 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. The power given hereunder shall include the right of any interested persons to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any non conforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they may be affected by these regulations.

Section 307 of the B.C.Z.R. - Variances.

"The Zoning Commissioner of Baltimore County and the County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations, from off-street parking regulations, and from sign regulations only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship. No increase in residential density beyond that otherwise allowable by the Zoning Regulations shall be permitted as a result of any such grant of a variance from height or area regulations. Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner as to grant relief without injury to the public health, safety and general welfare. They shall have no power to grant any other variances. Before granting any variance, the Zoning Commissioner shall require public notice to be given and shall hold a public hearing upon any application for a variance in the same manner as in the case of a petition for reclassification. Any order by the Zoning Commissioner or the County Board of Appeals granting a variance shall contain a finding of fact setting forth and specifying the reason or reasons for making such variance."

Zoning Advisory Committee Comments

The Zoning Advisory Committee Comments are made part of the record of this case and contain the following highlights. The Office of Planning recommends denial of these requests pursuant to the attached ZAC comments dated July 7, 2003. The Zoning Office likewise

recommends denial of the special hearing for reasons stated in their June 18, 2003 inter-office correspondence.

Interested Persons

Appearing at the hearing on behalf of the requested special hearing and variance relief were Brian G. Macari, Petitioner, and Stephen Warfield and Sar Crupi of Matis/Warfield, the engineers who prepared the site plan of the property. The Petitioner was represented by Howard L. Alderman, Jr., Esquire. David Wilford appeared as an interested citizen in the matter. People's Counsel, Peter Max Zimmerman, entered the appearance of his office in this case.

Testimony and Evidence

Special Hearing

The Petitioner requested a special hearing to determine what law applies to the proposed three-lot development. The Petitioner contends that he should be allowed to build three homes pursuant to present regulations on the seven lots of record reconfigured into three lots. The property is zoned D.R.5.5. The Petitioner contends that the setbacks, and distance between homes are pursuant to Section 1B01.2.C.1.b as follows: front face to property line, (25 ft.), side building face distance, (20 ft. for buildings > 20 ft. high), and rear yard face to property line (30 ft.). Having set this standard, the Petitioner declares that his design meets all these requirements and that no variance of any kind is needed.

The Petitioner's basic concept is to ignore the fact that the subject property was subdivided into lots in 1919 as shown on Petitioner's Exhibit No. 2, "Catonsville Heights", which has been recorded in the Land Records of Baltimore County. The Petitioner notes that Section 1B01.2.A.1 Density Controls, specifies that:

"Application of maximum density standards to tract in one zone. The maximum gross residential density permitted in any one D.R. zone shall control only as applied to the

total gross residential acreage within a subdivision tract, and shall not apply to or establish minimum areas of lots created by subdivision within such tract."

The Petitioner contends that based on this section, these lots, being part of a recorded subdivision, are not subject to D.R. zoning density limitations. However, should the present density requirements of the D.R. zone apply, the gross acreage is 0.466 acres, which if multiplied by 5.5 would indicate an allowed density of 2.563 units as the Planning Office points out. In zoning density calculations, one rounds down, not up, so that should D.R. density apply, only two homes could be built on the seven lots. The Petitioner proposes three homes. Consequently, the Petitioner argues that considering the overall Catonsville Heights subdivision, there are more than three density units available to the subdivision and so the setback and building to building distances should limit the number of homes to three.

The Zoning Office disagrees. The Zoning Office contends that Section 1B02.3, "Special regulations for certain existing developments or subdivisions and for small lots or tracts in D.R. Zones" applies. The Zoning Office points out that the Catonsville Heights subdivision has not been approved by the Baltimore County Planning Board, nor the old Baltimore County Planning Commission (from the days of the County Commissioners). See Section 1B02.3.A.1. Further, the Zoning Office notes that this subdivision has not been developed in accordance with regulations now rescinded. See Section 1B02.3.A.2. The gross area is 0.466 acres. The minimum for D.R.5.5 zoned land that will support six (6) dwelling units is 1.1 acres. See Section 1B02.3.A.3. Also, the property does not have the minimum ½ acre size. See Section 1B02.3.A.4. Finally, the tract of lots are in single ownership. See Section 1B02.3.A.5.

Consequently, according to the Zoning Office, the subject property does not fall under paragraphs A1 or A2 subdivisions, but rather, is controlled by paragraphs A3, A4 and A5 which, according to the regulations, means that standards for such development are controlled by

Subsection C1, the small lot chart. Here, small lots in D.R.5.5 zones are to have 6,000 sq. ft. minimum lot area, 55 ft. lot width, 25 ft. front yard depth, 10 ft. side yards, and 30 ft. rear yards. The proposed three lots would need 18,000 sq. ft. of area but have only 17,400 available. Consequently, the Zoning Office contends that only two homes may be constructed and density may not be the subject of a request for variance. See Section 307.1.

Finally, the Planning Office points out that Section 304, "Use of Undersized Single-Family Lots", contains essentially another hardship waiver for use of undersized lots if the lot was recorded in a validly approved subdivision (Subsection A), all other requirements of height and area regulation are complied with (Subsection B) and the lot owner does not own sufficient adjoining land to conform to the width and area regulations. The Planning Office contends that in this case, the owner does own adjoining land which would allow him to comply with the regulations in that he owns seven lots. For example, in regard to Lots 5, 6 and 7 (reconfigured Lot C), he has ample adjoining property in the adjacent lots to meet the requirements. This requires only that he build two and not three homes on the whole property.

Having considered that three-way argument presented, I am persuaded that this small piece of the Catonsville Heights subdivision is controlled by the small lot chart of Section 1B02.3.C.1. I find no evidence that this subdivision has been approved by the Planning Board, or Planning Commission, nor is there evidence the subdivision was approved under regulations now rescinded. The only evidence is that the subdivision was recorded in 1919. Consequently, Subsections A1 and A2 do not apply. Subsections A3 and A4 do clearly apply, as the area is less than ½ acre and cannot support 6 dwelling units. As the result, I find the small lot chart of Section 1B02.3.C.1 must be met.

While the Petitioner's argument is ingenious, it requires we pick and choose when to invoke the subdivision. If we ignore the subdivision and simply accept the Petitioner's argument that present regulations apply, then the property, while meeting the setback and spacing requirements of D.R.5.5 zoned land, does not meet the density requirements D.R.5.5 imposes. If we say the subdivision applies to get out of the density problem, we have then to look at seven lots, all of which are undersize. Even a reconfiguration of lots results in undersized lots. Finally, Section 304., Section C, states that small lot regulations are waived only if the Petitioner does not own sufficient adjoining land to meet the requirements. This tells me that the intention of Section 304.1 is to allow the hardship provision of this section only in cases where there is no way to solve the problem. If this were true, such lots would be destined to remain vacant forever. However, here the Petitioner only need combine existing lots to meet the minimum requirements. This does mean, of course, that only two homes may be constructed. Consequently, the Petitioner's request via special hearing is denied.

Variance Request

Having found that the small lot chart of Section 1B02.3.C.1 applies, the Petitioner's variance requests need to be addressed. An overriding factor in these deliberations is that under Section 307.1, I may not vary density. The Zoning Commissioner is given power to grant variance of area, height, parking and signs, but I am specifically forbidden to increase the density beyond that allowable by the Zoning Regulations. The spirit and intent of this provision are clear.

This means I may not grant variances, which, although not specifically calling for density variances, has the effect of same. In this case, the Petitioner requests variance of the undersized lots less than 6,000 sq. ft. Ordinarily, assuming the Petitioner can show special circumstances,

hardship and practical difficulty, these variances are routinely granted. But, here granting a variance to lot size is the same as granting a density variance. This I cannot do under the law. The zoning density allows only two homes to be built on these seven lots. I cannot vary the size of the lots to allow more homes.

Having determined that only two homes may be built on these lots, the remaining variance requests become moot. For example, the Petitioner requests variance for the lot width to allow lots less than 55 ft. in width. The reconfigured lots are 45, 40 and 60 ft. wide. Thus, two of the reconfigured lots do not meet the lot width of 55 ft. However, the Petitioner has a total of 145 ft. of width available to him. He may easily reconfigure the two lots allowed to have 70 ft. and 75 ft. and easily meet the 55 ft. requirement.

The Petitioner also requests a variance from the average front setback of 25 ft. in lieu of the 28.3 ft. average of the adjoining homes. However, the plan clearly shows that there is ample room in the rear yard into which the homes may be moved to meet the front regulations and not request a rear yard variance.

Finally, the Petitioner requests a variance from Section 102.5 to permit a principal building side yard setback on a corner lot of 15 ft. in lieu of the required 25 ft. As mentioned at the hearing, I have been unable to grasp why a home setback 25 ft. from the front property line as proposed by the homeowner could violate the 25 ft. corner lot setback. The Petitioner did not disagree but included this item at the request of County Reviewers. Nevertheless, with only two homes to be built on the seven lots, surely the Petitioner may locate the home closest to Lanvale Street so as not to violate the regulations.

For the reasons stated above, I will deny the variance requests.

THEREFORE, IT IS ORDERED, by the Deputy Zoning Commissioner for Baltimore County, this 25 day of September, 2003, that the Petitioner's request for Special Hearing relief to confirm a total of 3 residential dwellings on the property per the current Baltimore County Zoning Regulations shall not be approved. It is my determination that only two houses may be built on these lots.

IT IS FURTHER ORDERED, that the variance requests to permit 3 new homes on the property having lot widths less than the 55 ft. required, to approve a front yard setback of 25 ft., to approve the proposed configuration of lots of record, and to permit a side yard setback on a corner lot of 15 ft. variance, be and is hereby DENIED.

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

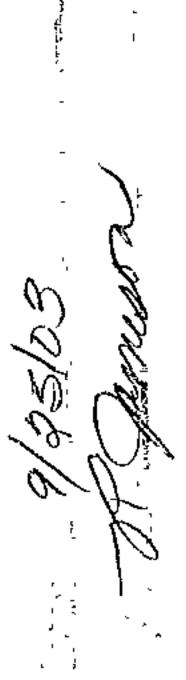
JOHN V. MURPHY

DEPUTY ZONING COMMISSIONER

FOR BALTIMORE COUNTY

JVM:raj

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Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at <u>Lafayette Avenue</u> <u>Q Lanvale Street</u> which is presently zoned <u>DR 5.5</u>

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

SEE ATTACHED

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(s): Contract Purchaser/Lessee: NONE Brian G. Macari Name - Type or Print Name - Type or Print Signature Signature Address Telephone No. Name - Type or Print City Zip Code State Signature 1400 Forest Glen Court 410-747-7144 <u>Attorney For Petitioner:</u> Address Telephone No. Howard L. Alderman, Jr., Esquire MD 21228 Baltimore Name - Type or Print State Zip Code City Representative to be Contacted: Signature Matis - Warfield, Inc. Steven A. Warfield, PE Levin & Gann, PA Company Name \$502 Washington Avenue, Suite 800 410-321-0600 410-683-7004 10540 York Road, Suite M Address Telephone No. Address Telephone No. MD 21030 Hunt Valley Towson 21204 Maryland City State City Zip Code Zip Code State OFFICE USE ONLY ESTIMATED LENGTH OF HEARING

Reviewed By

UNAVAILABLE FOR HEARING

Attachment 1

PETITION FOR SPECIAL HEARING

| CASE NO: | 03 | SPH | |
|----------|----|-----|--|
|----------|----|-----|--|

Address:

Lafayette Avenue, South of Lanvale Street, including 25 Lanvale Street

Legal Owner:

Brian G. Macari

Present Zoning:

DR 5.5

REQUESTED RELIEF:

"why the Zoning Commissioner should" [1] confirm that Lot Nos. 1, 2, 3, 4, 5, 6 & 7 as shown on the Plat of Catonsville Heights, can be improved with a total of three residential dwellings using a gross area calculation and the bulk standards of the Baltimore County Zoning Regulations as presently adopted; or, alternatively, using a gross area calculation grant the variance relief from Section 1B02.3 of the BCZR filed contemporaneously herewith; [2] approve the amendment of any applicable development and/or final development plan for Catonsville Heights consistent with the relief requested; and [3] for such additional relief as the nature of this case as presented at the time of the hearing on this Petition may require, within the spirit and intent of the BCZR.

FOR ADDITIONAL INFORMATION ON THIS PETITION, PLEASE CONTACT:

Howard L. Alderman, Jr., Esquire Levin & Gann, P.A. 8th Floor, Nottingham Centre 502 Washington Avenue Towson, Maryland 21204

(410) 321-0600 Fax: (410) 296-2801 halderman@LevinGann.com



Petition for Variance

to the Zoning Commissioner of Baltimore County

for the property located at Lafayette Avenue @ Lanvale Street

which is presently zoned DR 5.5

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 Variance from Section(s)

SEE ATTACHED

of the Zoning Regulations of Baltimore County, to the zoning law of Baltimore County, for the following reasons: (indicate hardship or practical difficulty)

SEE ATTACHED

Property is to be posted and advertised as prescribed by the zoning regulations. I, or we, agree to pay expenses of above Variance, 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.

Contract Purchasaril associ

| Contract Purchaser/Lessee | <u>):</u> | | <u>Legal Owner(</u> | <u>(s):</u> | |
|---------------------------------------|---------------------|-------------|-----------------------|-----------------|---|
| NONE | | | Brian G. Mac | ari | |
| Name - Type or Print | | Name | - Type or Print | | |
| Signature | | | Signature | | |
| Address | Telephone N | √o. | Name - Type of Print | <u> </u> | ·· <u>·</u> ································· |
| City | State Zip Co | ode | Signature | | |
| Attorney For Petitioner: | | | 1400 Forest Gl | en Court | 410-747-7144 |
| | | | Address | | Telephone No. |
| Howard L. Alderman, Jr. | , Esquire | | Baltimore | MD | 21228 |
| Name - Type or Print | | City | | State | Zip Code |
| Down (Vled | 11-6/ | | <u>Representativ</u> | ve to be Contac | ted: |
| Signature Levin & Gann, PA Nottingha | m Centre. 8th Floor | | Steven A. War | field, PE Mat | tis - Warfield, Inc. |
| Company | 410-321-0600 | | Name 10540 York Ro | oad, Suite M | 410-683-7004 |
| Address | Telephone N | 0. | Address | <u> </u> | Telephone No. |
| Towson, MD 2120 | 04 | | Hunt Valley | MD | 21030 |
| City | State Zip Co | ode | City | S | State Zıp Code |
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Attachment 1 PETITION FOR VARIANCE

CASE NO: <u>03</u>-

Address:

Lafayette Avenue, South of Lanvale Street, including 25 Lanvale Street

Legal Owner:

Brian G. Macari

Present Zoning:

DR 5.5

REQUESTED RELIEF:

If the requested Special Hearing relief is not granted, from: i) applicable provisions of the CMDP and BCZR § 1B02.3.C to permit a total of three (3) new dwelling units to be constructed on the seven (7) lots of record comprising the subject property in accordance with the following:

| | Lot Width in Lieu of 55' Req'd. | Front Yard Depth in Lieu of 25' Reqd | Width of Indiv. Side Yard in Lieu of 10' Req'd | Rear Yard Depth in lieu of 30' Req'd |
|------------------------------------|------------------------------------|--------------------------------------|--|--------------------------------------|
| Prop. Lot No. 1 (Ex Lots 1 & 2) | | | Not Less than Min Maintained | Not Less than Min Maintained |
| Prop. Lot No. 2 (Ex Lots 3 & 4) | 40' | 25' in lieu of Avg. 28.83' | Not Less than Min Maintained | Not Less than Min Maintained |
| Prop. Lot No. 3 (Ex. Lots 5-7) | Not Less than Min Maintained | 25' in lieu of Avg. 28.83' | Not Less than Min Maintained | Not Less than Min Maintained |

ii) to approve the proposed undersized lots; iii) as to Proposed Lot No. 1 only, a variance from BCZR § 102.5 to permit a principal building side yard setback on a corner lot of 15' in lieu of the 25' required; and iv) such additional relief from the BCZR as the Commissioner may deem necessary to implement the proposed uses of the property as shown more specifically on the Plat to Accompany this Petition.

JUSTIFICATION:

- 1. Reconfiguration of seven lots of record to permit a total of three dwelling units to be constructed;
- 2. Existing topographic constraints and other site constraints;
- 3. For such further reasons that will be presented at the hearing on this Petition.

FOR ADDITIONAL INFORMATION ON THIS PETITION, PLEASE CONTACT:

Howard L. Alderman, Jr., Esquire Levin & Gann, P.A. 8th Floor, Nottingham Centre 502 Washington Avenue Towson, Maryland 21204

(410) 321-0600 Fax: (410) 296-2801 halderman@LevinGann.com



consulting engineers

ZONING DESCRIPTION

OF PROPERTY: LAFAYETTE AVENUE

Beginning at a point northeast of Lafayette Avenue which is 40-feet wide, at a distance of 504-feet northeast of the centerline of the intersecting street, Woodsdale Road. Thence the following courses and distances:

N 11° 02' 00" E145.00'; S 78° 58' 00" E 120.00'; S 11° 02' 00" W 145.00'; N 78° 58' 00" W 120.00';

To the point of beginning,

Containing 0.399 acres +/- (7 lots). Also known Parcel 227 as shown on Baltimore County Tax Map 95 and located in the 1st Election District and 1st Councilmatic District and shown on Baltimore County Zoning Map SW 2F.





| | BALTIMORE COUNTY, MARYLAND ICE OF BUDGET & FINANCE MISCELLANEOUS RECEIPT | |
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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 <u>Towson</u>, <u>Maryland</u> on the property identified herein as follows.

Case: #03-598-SPHA

Lafayette Avenue and Lanvale Street

N/east side of Lafayette Avenue, 500 feet +/- northeast of

Woodsdale Road '

1st Election District - 1st Councilmanic District

Legal Owner(s): Brian G. Macari

Special Hearing: to confirm a total of 3 residential dwellings on the property per the current Baltimore County Zoning Regulations, or alternatively, grant the companion variance relief, and approve the amendment of any final development plan for Catonsville Heights consistent with the relief granted.

Variance: if the Special Hearing relief not granted, a variance to permit 3 new homes on the property having lot widths less than 55 feet required, to approve a front yard setback of 25 feet, approve the proposed reconfiguration of lots of record and to permit a side yard setback on a corner lot at 15 feet.

Hearing(s): Wednesday, August 27, 2003 at 9:00 a.m. in Room 407, County Courts Building, 401 Bosley Avenue.

LAWRENCE E. SCHMIDT

Zoning Commissioner for Baltimore County

NOTES. (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Zoning Com-

missioner's Office at (410) 887-4386.

(2) For information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391 C620153 JT 8/648 Aug 12

CERTIFICATE OF PUBLICATION

| 8/14/,2003 |
|---|
| THIS IS TO CERTIFY, that the annexed advertisement was published |
| in the following weekly newspaper published in Baltimore County, Md., |
| once in each ofsuccessive weeks, the first publication appearing |
| on 812 , 2003 . |
| The Jeffersonian Arbutus Times |
| ☐ Catonsville Times |
| ☐ Towson Times |
| Owings Mills Times |
| ☐ NE Booster/Reporter |
| ☐ North County News |
| |

LEGAL ADVERTISING

CERTIFICATE OF POSTING

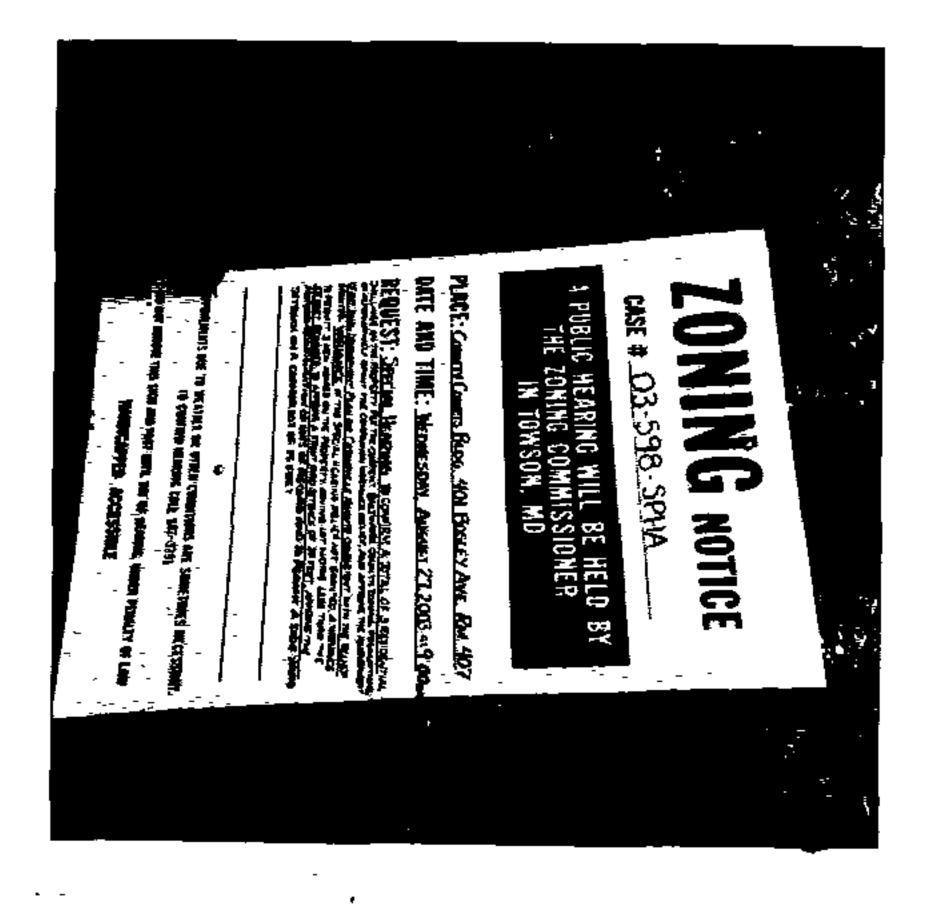
| RE: Case No.: <u>03-598</u> - SPHA |
|---|
| Petitioner/Developer: |
| Brian G. Macari |
| Date of Hearing/Closing: 8/27/03 |
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| ity that the necessary sign(s) required by law id at the corner of Lafayette Ave |
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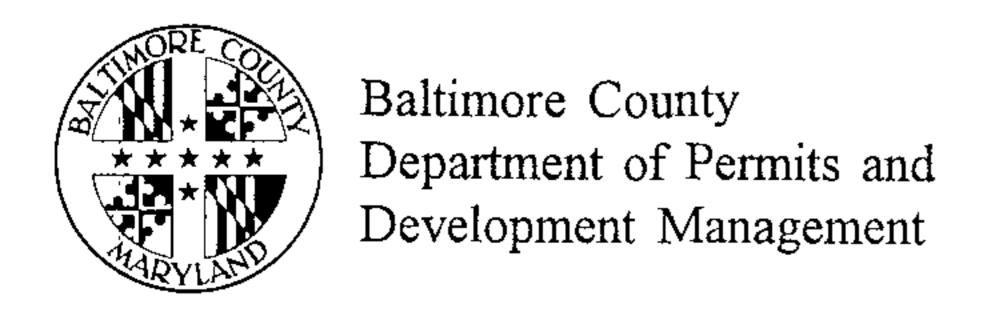
Baltimore County Department of Permits and Development Management County Office Building, Room 111 111 West Chesapeake Avenue Towson, MD 21204 Attention: Ms. Gwendolyn Stephens

Ladies and Gentlemen:

This letter is to certify under the penalties of perju were posted conspicuously on the property locates and Lanvale Street Catonsville, 1

The sign(s) were posted on





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

Fax: 410-887-5708

July 1, 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: 03-598-SPHA

Lafayette Avenue and Lanvale Street N/east side of Lafayette Avenue, 500 feet +/ -northeast of Woodsdale Road 1st Election District – 1st Councilmanic District Legal Owner: Brian G. Macari

<u>Special Hearing</u> to confirm a total of 3 residential dwellings on the property per the current Baltimore County Zoning Regulations; or alternatively, grant the companion variance relief; and approve the amendment of any final development plan for Catonsville Heights consistent with the relief granted. <u>Variance</u> if the Special Hearing relief not granted, a variance to permit 3 new homes on the property having lot widths less than the 55 feet required, to approve a front yard setback of 25 feet, approve the proposed reconfiguration of lots of record and to permit a side yard setback on a corner lot of 15 feet.

Hearings:

Wednesday, August 27, 2003 at 9:00 a.m. in Room 407, County Courts Building, 401

Bosley Avenue

Timothy Kotroco Director

TK:rlh

C: Howard L. Alderman, Levine & Gann, Nottingham Centre, 8th Floor, 502 Washington Avenue, Towson 21204

Steven A. Warfield, Matis-Warfield, 10540 York Road, Suite M, Hunt Valley 21030 Brian G. Macari, 1400 Forest Glen Court, Baltimore 21228

NOTES: (1) THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY TUESDAY, AUGUST 12, 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.

TO:

PATUXENT PUBLISHING COMPANY

Tuesday, August 12, 2003, Issue - Jeffersonian

Please forward billing to:

Matis-Warfield, Inc. 10540 York Road, Suite M Hunt Valley, MD 21030

410-683-7004

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:

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Bosley Avenue

LAWRENCE E. SCHMIDT

ZONING COMMISSIONER FOR BALTIMORE COUNTY

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(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 <u>Baltimore County Zoning Regulations</u> (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.

| 'n |
|--|
| For Newspaper Advertising: |
| item Number or Case Number: 03 598 SPHA |
| Petitioner: Brian G Macari |
| Address or Location: 1400 Forest GLEN Ct BALTIMORE MD 2122 |
| PLEASE FORWARD ADVERTISING BILL TO: |
| Name: Matis Warfield Inc |
| Address: 10540 YORK ROAD, SUITE M |
| Hunt Valley, MA 21030 |
| Telephone Number: 410 683 7004 |

Revised 2/20/98 - SCJ



Baltimore County
Department of Permits and
Development Management

Development Processing County Office Building 111 West Chesapeake Avenue Towson, Maryland 21204

August 22, 2003

Mr. Howard Alderman, Jr. Levin & Gann 502 Washington Avenue Towson, MD 21204

Dear Mr. Alderman:

RE: Case Number:03-598-SPHA, Lafayette Avenue and Lanvale Street

The above referenced petition was accepted for processing by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on June 19, 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 Ir

W. Carl Richards, Jr. Supervisor, Zoning Review

WCR:rlh

Enclosures

c: People's Counsel Brian G. Macari, 1200 Forest Glen Road, Baltimore, MD 21228 Steven A. Warfield, 10540 York Road, Suite M, Hunt Valley, MD 21030 Robert L. Ehrlich, Jr., Governor Michael S. Steele, Lt. Governor



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

MARYLAND DEPARTMENT OF TRANSPORTATION

Date: 7.1.03

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

RE:

Baltimore County

Item No. 598

JL

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,

1~

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

1. J. Hell



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

July 1, 2002

ATTENTION: Rebecca Hart

Distribution Meeting of: June 30, 2003

Item No.: 577-580, 583-588, 590-601

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

July

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO:

Timothy M. Kotroco, Director

DATE: July 7, 2003

Department of Permits and Development Management

FROM:

Arnold F. 'Pat' Keller, III

Director, Office of Planning

SUBJECT:

519 Lafayette Avenue

INFORMATION:

Item Number:

03-598

KECEIVED

Petitioner:

Brian G. Macari

JUL - 9 2003

Zoning:

DR 5.5

Requested Action:

Special Hearing/Variance

ZONING COMMISSIONER

SUMMARY OF RECOMMENDATIONS:

The Office of Planning reviewed the petitioner's request and recommend that it be **DENIED** due to the following:

- 1. Based on the gross area of the subject site, only 2 dwelling units are permitted (0.466 gross acre x 5.5 dwelling units/acre = 2.563 units).
- 2. Two of the proposed lots do not comply with the Development Standards for Small Lots and Tracts in Section 1B02.3.C.1 of the BCZR. The proposed lots identified as #519 and #521 do not meet the 6,000 square feet minimum lot size requirement or the minimum lot width requirement of 55 feet.
- 3. The proposed lots identified as #519 and #521 do not comply with Section 304.1.C of the BCZR, in that all of the existing 7 lots are contiguous and are under the same ownership. In addition, there is sufficient land to conform to the area requirements of the regulations if the existing lots are reconfigured into 2 building lots.
- 4. The proposed dwellings to be located on the proposed lots identified as #519 and #521 do not comply with Section 304.2.B of the BCZR, in that the architectural design of the proposed dwellings is inconsistent with the architectural style of existing houses in the neighborhood. The proposed dwellings will have 3 stories and will look like detached townhouses. Except for one 2-story house, all of the existing dwellings on Lafayette Avenue between Valcour

Road and Woodsdale Road are 1-story Ranch style houses and 1- or 1½-story Cape Cod style houses.

Prepared by:

Section Chief:

AFK/LL:MAC:

RECEIVED

JUL - 9 2003

ZONING COMMISSIONER

BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO:

Timothy M. Kotroco, Director

DATE: September 5, 2003

Department of Permits & Development Management

Robert W. Bowling, Supervisor Bureau of Development Plans

Review

SUBJECT:

Zoning Advisory Committee Meeting

For July 7, 2003

Item Nos. 577, 578, 580, 581, 587, 589, \$90, 593, 594, 595, 596, 597, 598, \$99, and 600

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

RWB:CEN:jrb

cc: File

INTER-OFFICE CORRESPONDENCE RECOMMENDATION FOR

0;

TO:

Director, Office of Planning & Community Conservation

Attention: Jeffrey Long

County Courts Building, Room 406

401 Bosley Avenue Towson, MD 21204

FROM: Arnold Jablon, Director

Department of Permits & Development Management OFFICE OF PLANNING

JUN 2 0 2003

Residential Processing Fee Paids (\$50.00)

Accepted by ____

Portril or Case No. 6

Undersized Lots

Pursuant to Section 304.2 (Baltimore County Zoning Regulations) effective June 25, 1992, this office is requesting recommendations and comments from the Office of Planning and Community Conservation prior to this office's approval of a dwelling permit. MINIMUM APPLICANT SUPPLIED INFORMATION: (Ex LOT 1 + LOT 2) 1400 FUREST Glen Ct. BALT, MD 21228 410-747-7144
Address BRIAN G. MACARI Lot Address 521 LAFAUETTE AFAUE Election District / Councilmanic District / Square Feet 5,400 Frint Name of Applicant Lot Location: NES Wiside corner of LAFAYETTE AVENUE. 20 feet from NES)W corner of LANVALE STREET (street) Tax Account Number 01-0935-0299 Land Owner: BRIAN G. MACAR Telephone Number (40) 747-7/44 Address: 1400 FOREST Glen Ct. BALT. MD 21228 CHECKLIST OF MATERIALS». (to be submitted for design review by the Office of Planning and Community Conservation) TO BE FILLED IN BY ZONING REVIEW, DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT ONLY NO I COTY YES. 1. This Recommendation Form (3 copies) 2. Permit Application 1209 3. Site Plan Property (3 copies) 4. Building Elevation Drawings 5. Photographs (please label all photos clearly) Adjoining Buildings Surrounding Neighborhood JL SPOKE TO LYNN LAWHAM 6/18 COPY EA, OK 6. Current Zoning Classification: TO BE FILLED IN BY THE OFFICE OF PLANNING ONLY

RECOMMENDATIONS / COMMENTS: Approval conditioned on re-Disapproval Αρριοναί Phone #

7671 Post-It* Fax Note From Co./Dept. Zomy Ça. Phone # 5862 Fax #

7/15/2002

Revised 2/05/02

SCHEDULED DATES, CERTIFICATE OF FILING AND POSTING FOR A BUILDING PERMIT APPLICATION PURSUANT TO SECTION 304.2

RE: PETITION FOR SPECIAL HEARING * BEFORE THE
AND VARIANCE
Lafayette Avenue & Lanvale Street; NE/side* ZONING COMMISSIONER
Lafayette Avenue, 500' +/- NE Woodsdale Rd
1st Election & 1st Councilmanic Districts * FOR
Legal Owner(s): Brian G Macari
Petitioner(s) * BALTIMORE COUNTY

* 03-598-SPHA

* * * * * * * * * *

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

People's Counsel for Baltimore County

RECEIVED

JUL 0 3 2003

Per....

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 2 day of July, 2003, a copy of the foregoing Entry of Appearance was mailed to Steven A Warfield, PE, Matis-Warfield, Inc, 10540 York Road, Suite M, Hunt Valley, MD 21030, and to Howard L Alderman, Levin & Gann, P.A., 502 Washington Avenue, 8th Floor, Towson, MD 21204, Attorney for Petitioner(s).

PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

To: Zoning Commissioner

Re: Zoning Review Comments, Case # 03-598-SPHA

Staff does not support the request for hearings involving gross area calculations and subdivision regulations under lB02.3.

The staff position for the lots in this subdivision is as follows: when 6-lot density and the minimum ½ acre is not available under the requirements of 1B02.3.A. 3 and 4 the development standards under section 1B02.3.C.1 apply. Mr. Richards of this office believes that:

"since the property lacks the density for 6 lots, net area calculations must be used. since only 17,400 square feet of net area exist, the total number of dwelling units permitted will each require 6,000 square feet of area. There is a shortfall of 600 square feet for the development of 3 lots and it is the position of the staff that density may not be varianced".

This position has been made clear to Mr. Alderman from the time of the first drop off petition review.

John Lewis

Planner II

Zoning Review

JL/rjc

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 25, 2003

Howard Alderman, Esquire Levin & Gann 502 Washington Avenue, 8th Floor Towson, Maryland 21204

Re: Petition for Variance Case No. 03-598-A

Property: Lafayette Avenue @ Lanvale Street

Dear Mr. Alderman:

Enclosed please find the decision rendered in the above-captioned case. The Petition for Variance has been denied in accordance with the enclosed Order.

In the event the decision rendered is unfavorable to any party, please be advised that any party may file an appeal within thirty (30) days from the date of the Order to the Department of Permits and Development Management. If you require additional information concerning filing an appeal, please feel free to contact our appeals clerk at 410-887-3391.

Very truly yours,

John V. Murphy

Deputy Zoning Commissioner

JVM:raj Enclosure



Copies to:

Brian G. Macari 1400 Forest Glen Court Baltimore, MD 21228

Stephen A. Warfield, PE Sal Crupi, PE Matis-Warfield, Inc. 10540 York Road, Suite M Hunt Valley, MD 21030

David Wilford 513 Lafayette Avenue Baltimore, MD 21228

LAW OFFICES

Levin & Gann

A PROFESSIONAL ASSOCIATION

NOTTINGHAM CENTRE 502 WASHINGTON AVENUE 8th Floor TOWSON, MARYLAND 21204

> 410-321-0600 TELEFAX 410-296-2801

June 24, 2003

PLEASE DELIVER THE FOLLOWING PACES TO

ELLIS LEVIN (1893-1960) CALMAN A LEVIN (1930-2003)

| NAME | TELEFAX NO. |
|------------|--------------|
| ATTN: ROSE | 410-887-2824 |

FROM:

HOWARD L ALDERMAN, JR.

halderman(DLevinGann com

DIRECTDIAL

410 321-4640

HOWARD L. ALDERMAN, JR., ESQUIRE

73-598

NUMBER OF PAGES [INCLUDING THIS COVER PAGE]:

CLIENT/MATTER: Lafayette Avenue, South of Lanvale Street

COMMENTS: Rose: here is a further reduced draft of "sign" language for the abovereferenced property as required by Carl. Please review this with Carl and mark up, add or delete as the two of you may deem necessary in your preparation of the information to be contained on the required sign and advertising. Thanks.

ORIGINAL WILL NOT BE MAILED

If you do not receive all of the pages indicated above, please call 321-0600 as soon as possible. My return FAX Number is (410) 296-2801.

> WARNING: UNAUTHORIZED INTERCEPTION OF THIS TELEFAX COMMUNICATION COULD BE A VIOLATION OF FEDERAL AND MARYLAND LAW,

The information contained in this transmission is attorney privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in en or, please notify us immediately by telephone collect and return the original message to us at the above address matthe U.S. Postal Service. We will temburse you for expenses. Thank You

Rose:

Per the direction of Carl Richards, I have further reduced the relief requested for advertising and sign posting purposes. I trust that Carl will now approve the following:

SPECIAL HEARING

confirm a total of 3 residential dwellings on the property per the current *Baltimore County Zoning Regulations*; or, alternatively, grant the companion variance relief; and approve the amendment of any final development plan for Catonsville Heights consistent with the relief granted.

VARIANCE

If the Special Hearing relief is not granted, a variance to permit 3 new homes on the property having lot widths less than the 55 feet required, to approve a front yard setback of 25 feet, approve the proposed reconfiguration of lots of record and to permit a side yard setback on a corner lot of 15 feet.

HOWARD L. ALDERMAN, JR.

halderman@LovinGam.com

DIRECT DIAL

410-321-4640

LAW OFFICES

LEVIN & GANN

A PROFESSIONAL ASSOCIATION

NOTTINGHAM CENTRE
502 WASHINGTON AVENUE
8th Floor
TOWSON, MARYLAND 21204
410-321-0600
TELEFAX 410-296-2801

ELLIS LEVIN (1893-1960) CALMAN A. LEVIN (1930-2003)

June 6, 2003

PLEASE DELIVER THE FOLLOWING PAGES TO:

| NAME | TELEFAX NO. | | |
|----------------|--------------|--|--|
| Mr. John Lewis | 410-887-2824 | | |

FROM:

HOWARD L. ALDERMAN, JR., ESQUIRE

NUMBER OF PAGES [INCLUDING THIS COVER PAGE]:

2

CLIENT/MATTER: Lafayette Avenue, South of Lanvale Streed

COMMENTS: John: here is a proposed draft of "sign" language for the above-referenced property. Please review this with Carl and mark up, add or delete as the two of you may deem necessary in your preparation of the information to be contained on the required sign. Thanks.

x] ORIGINAL WILL NOT BE MAILED

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the information contained in this transmission is attorney provileged and confidential. It is intended only for the use of the individual or entry named above. If the teader of this message is not the intended recipient, you are hereby in tilled that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by elophone collect and return the original message to us at the above address via the U.S. Pustal Service. We will reimburse you for expenses. Thank You.

SPECIAL HEARING

confirmation that the property can be improved with a total of three residential dwellings using the gross area calculation and bulk standards of the *Baltimore County Zoning Regulations* as presently adopted; or, alternatively, grant the variance relief requested from Section 1B02.3; and approve the amendment of any applicable development and/or final development plan for Catonsville Heights consistent with the relief requested.

VARIANCE

If the requested Special Hearing relief is not granted, a variance to permit a total of three new dwelling units to be constructed on the subject property having lot widths less than the 55 feet otherwise required, to approve a front yard setback of 25 feet in lieu of the 28.83 feet required, to approve the proposed undersized lots as a reconfiguration of lots of record and to permit a principal building side yard setback on a corner lot of 15 feet in lieu of the 25 feet required

Manger 6/2/03

| Zoning Classifica- tion | Minimum Net Lot Area per Dwlling Unit (sq. ft.) | Minimum Lot Width (feet) | Minimum Front Yard Depth (feet) | Minimum Width of Individual Side Yard (feet) | Minimum Sum of Side Yard Widths (feet) | Minimum Rear Yard Depth (feet) |
|-------------------------------|---|--------------------------------|---------------------------------|--|--|---|
| D.R.1 | 40,000 | 150 | 50 | 20 | 50 | 50 |
| D.R.2 | 20,000 | 100 | 40 | 15 | 40 | 40 |
| D.R.3.5 | 10,000 | 70 | 30 | 10 | 25 | 30 |
| D.R.5.5 | (6,000) | .(55) | (25) | 10 | | 30 |
| D.R.10.5 | 3,000 | 20 | 10 | 10 | | 50 |
| D.R.16 | 2,500 | 20 | 10 | 25 | | 30 |

- 2. Other standards for development of small lots on tracts as so described shall be as set forth in provisions adopted pursuant to the authority of Section 504.
- D. An amendment to any part of a development plan involving only property subject to the provisions of this subsection shall not be subject to the provisions of Section 1B01.3.A.7.

all improved lots within 200 feet on each side thereof, provided that no dwelling shall be required to be set back more than 60 feet in D.R.2 Zones, 50 feet in D.R.3.5 Zones and 40 feet in D.R.5.5 Zones. In no case, however, shall nonresidential principal buildings have front yards of less depth than those specified therefor in the area regulations for D.R.2, D.R.3.5 and D.R.5.5 Zones respectively. [Resolution, November 21, 1956]

In B.L., B.M. and B.R. Zones, the front yard depth of any building hereafter erected shall be the average of the front yard depths of the lots immediately adjoining on each side, provided such adjoining lots are improved with permanent commercial buildings constructed of fire-resisting materials situate within 100 feet of the joint side property line, but where said immediately adjoining lots are not both so improved, then the depth of the front yard of any building hereafter erected shall be not less than the average depth of the front yards of all lots within 100 feet on each side thereof which are improved as described above.

Section 304 Use of Undersized Single-Family Lots [BCZR 1955; Bill No. 47-1992]

- [Bill Nos. 64-1999; 28-2001] Except as provided in Section 4A03, a one-family detached or semidetached dwelling may be erected on a lot having an area or width at the building line less than that required by the area regulations contained in these regulations if:
 - A. Such lot shall have been duly recorded either by deed or in a validly approved subdivision prior to March 30, 1955;
 - B. All other requirements of the height and area regulations are complied with; and
 - C. The owner of the lot does not own sufficient adjoining land to conform to the width and area requirements contained in these regulations.
- 304.2 Building permit application.
 - A. Any person desiring to erect a dwelling pursuant to the provisions of this section shall file with the Department of Permits and Development Management, at the time of application for a building permit, plans sufficient to allow the Office of Planning to prepare the guidelines provided in Subsection B below. Elevation drawings may be required in addition to plans and drawings otherwise required to be submitted as part of the application for a building permit. Photographs representative of the neighborhood where the lot or tract is situated may be required by the Office of Planning in order to determine appropriateness of the proposed new building in relation to existing structures in the neighborhood.
 - B. At the time of application for the building permit, as provided above, the Director of the Department of Permits and Development Management shall request comments from the Director of the Office of Planning (the "Director"). Within 15 days of receipt of a request from the Director of the Department of Permits and Development Management, the Director shall provide to the

Department of Permits and Development Management written recommendations concerning the application with regard to the following:

- 1. Site design. New buildings shall be appropriate in the context of the neighborhood in which they are proposed to be located. Appropriateness shall be evaluated on the basis of new building size, lot coverage, building orientation and location on the lot or tract.
- Architectural design. Appropriateness shall be evaluated based upon one or more of these architectural design elements or aspects:
 - a. Height.
 - Bulk or massing.
 - c. Major divisions, or architectural rhythm, of facades.
 - d. Proportions of openings such as windows and doors in relation to walls.
 - e. Roof design and treatment.
 - f. Materials and colors, and other aspects of facade texture or appearance.
- 3. Design amendments. The Director may recommend approval, disapproval or modification of the building permit to conform with the recommendations proposed by the Office of Planning.
- Public notice. Upon application for a building permit pursuant to this section, the subject property shall be posted conspicuously under the direction of the Department of Permits and Development Management with notice of the application for a period of at least 15 days.
- Public hearing. Within the fifteen-day posting period: (1) Any owner or occupant within 1,000 feet of the lot may file a written request for a public hearing with the Department of Permits and Development Management, or (2) the Director of Permits and Development Management may require a public hearing. The Department of Permits and Development Management shall notify the applicant within 20 days of the receipt of a request for a public hearing. A hearing before the Zoning Commissioner shall be scheduled within 30 days from receipt of the request for public hearing. At the public hearing, the Zoning Commissioner shall make a determination whether the proposed dwelling is appropriate.
- 304.5 Final approval.
 - A. The Director of the Department of Permits and Development Management may issue the building permit; or
 - B. Notwithstanding any provision to the contrary, the Director of the Department of Permits and Development Management may require a public hearing before the Zoning Commissioner pursuant to Section 304.4 above; or

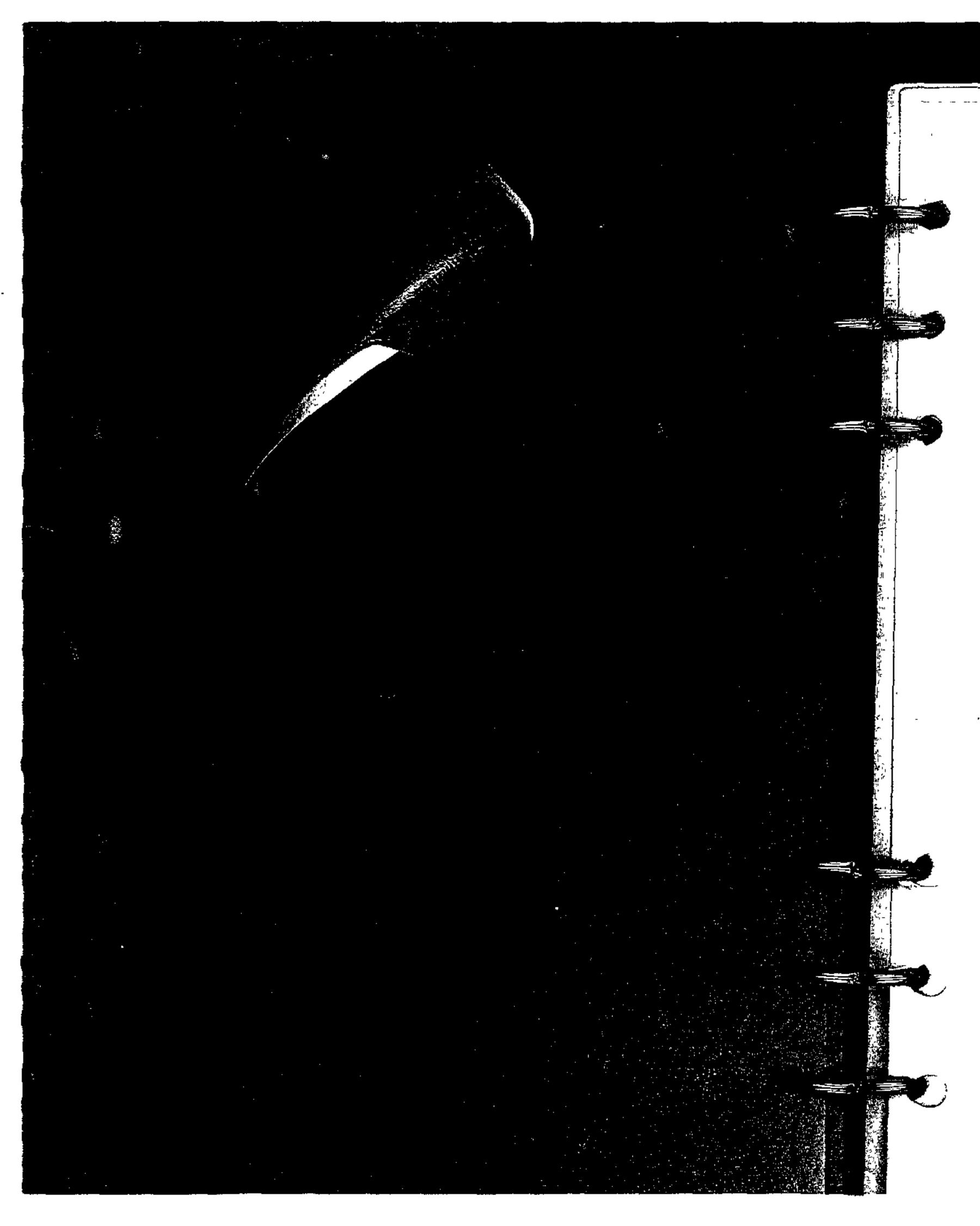
- No portion of an alley shall be considered as any part of a side or rear yard.
- No dwelling, other than a multifamily building, shall be built on a lot containing less than 20,000 square feet which does not abut on a right-of-way at least 30 feet wide over which the public has an easement of travel, except as provided for panhandle lots in Section 26-266 of the Baltimore County Code, 1988 Edition, as revised. [Bill Nos. 172-1989; 2-1992]
- On a corner lot in any residential zone, no planting, fence, wall, building or other obstruction to vision more than three feet in height shall be placed or maintained within the triangular area bounded on two sides by the front and side street property lines, or by projections of said lines to their point of intersection, and on the third side by a straight line connecting points on said lot lines (or their projections), each of which points is 25 feet distant from the point of intersection. At the intersection of a street and an alley, the dimension corresponding to the 25 feet noted above shall be 15 feet and 10 feet at the intersection of two alleys. Poles, posts and guys for streetlights and for other utility services shall not be considered obstructions to vision within the meaning of this section. [Resolution, November 21, 1956]
- No building permit shall be issued for any commercial, industrial or apartment development until the proposed plan for vehicular access thereto shall have been first approved by the Baltimore County Department of Permits and Development Management. [Resolution, November 21, 1956]
- Where development of a property includes both a special exception and a residential subdivision, the area allocated for use as a special exception shall not be included in the calculation of residential density. [Bill No. 74-2000]

Section 103 Application of Zoning Regulations [BCZR 1955]

These regulations shall apply as of the date of their adoption but the provisions pertaining to use, height, area and density of population shall not apply to any development, subdivision or parcel of land, the preliminary plan for which was originally submitted to the (then) Baltimore County Planning Commission (now Planning Board) and approved or tentatively approved (including any approval made subject to any condition or conditions) under the then existing official procedure in Baltimore County, prior to the adoption of these regulations. The Zoning Regulations applicable to any such development, subdivision or parcel of land as aforesaid shall be the Zoning Regulations in effect at the time such plan, as aforesaid, was originally submitted to the Baltimore County Planning Commission.

Provided further, however, that the use and development of land in M.L. Zones shall not be affected by the foregoing provision, but development is permitted in accordance with any preliminary development plan approved by the Office of Planning before the effective date of this further proviso, even though such development may be counter to then-current regulations for M.L. Zones, if, on the

⁵ Editor's Note: Refers to the Baltimore County Zoning Regulations (BCZR) adopted March 30, 1955.



DEFINITIONS

Convalescent Home: This term includes rest homes, nursing homes, convalescent homes for children, and homes providing chronic and convalescent care. It does not include a "care home" as defined by the Maryland State Health Department, which merely provides board, shelter, and personal services in a protective environment for persons not gainfully employed.

Density, Gross: The acres within each separate zone in a project divided into the dwelling units in each such zone, including not more than half the width of bordering streets and alleys.

Density, Net: Net Density is based on the area of the lot or lots involved. Offstreet parking space shall be considered part thereof only if contained therein.

Dwelling: A building or portion thereof which provides living facilities for one or more families.

Dwelling, One-Family: A detached building arranged or used for occupancy by one family.

Dwelling, Two-Family: A building arranged or used for occupancy by two families as separate house-keeping units. It may be either a duplex or a semi-detached dwelling.

Dwelling, Duplex: A two-family detached building with one housekeeping unit over the other.

Dwelling, Semi-detached: A building that has two one-family housekeeping units erected side by side on adjoining lots, separated from each other by an approved masonry party wall extending from the basement or cellar floor to the roof along the dividing lot line, and separated from any other building by space on all sides.

Dwelling, Group House: A building that has not less than three nor more than six one-family house-keeping units erected in a row as a single building, on adjoining lots, each being separated from the adjoining unit or units by an approved masonry party wall or walls extending from the basement or cellar floor to the roof along the dividing lot line, and each such building being separated from any other building by space on all sides.

ZONING COMMISSIONER'S POLICY MANUAL

SECTION 101

Source: Legal > / . . . / > MD State Cases, Combined (3)

Terms: foxshire (Edit Search)

145 Md. App. 695, *; 806 A.2d 348, **; 2002 Md. App. LEXIS 140, ***

JOHN A. HEARD, JR., et al v. FOXSHIRE ASSOCIATES, LLC

No. 930, September Term, 2001

COURT OF SPECIAL APPEALS OF MARYLAND

145 Md. App. 695; 806 A.2d 348; 2002 Md. App. LEXIS 140

September 3, 2002, Filed

PRIOR HISTORY: [***1] APPEAL FROM THE Circuit Court for Washington County. John H. McDowell, JUDGE.

DISPOSITION: Reversed and remanded with instructions.

CASE SUMMARY

PROCEDURAL POSTURE: A county board of appeals (board) granted a special exception to appellee limited liability company to extend the entrance to a retail shopping center owned by the limited liability company. Appellant homeowners sought review of the grant of the special exception. The Circuit Court for Washington County (Maryland) affirmed the decision. The homeowners appealed.

OVERVIEW: At the hearing before the board, the limited liability company presented only one witness, although its attorney gave a lengthy opening statement. The homeowners argued that there was insufficient evidence to support the grant of the special exception. The appellate court ruled that the appropriate standard in determining whether a requested special exception use should have been granted was whether the particular use proposed would have had any adverse effects above and beyond those inherently associated with such a special exception use, irrespective of its location within the zone. An attorney was allowed to give evidence before an administrative agency, but such evidence needed to be under oath as a sworn witness. The appellate court found that the attorney was not a sworn witness. Therefore, what he told the board was argument and not evidence. Since there was thus no substantive evidence about whether the particular use proposed would have any adverse effects above and beyond those inherently associated with such a special exception use, the evidence before the board was neither substantial nor sufficient to support its factual findings.

OUTCOME: The judgment was reversed and the case was remanded to the board.

CORE TERMS: special exception, sworn, administrative agencies, administrative agency, substantial evidence, opening statement, Rules of Professional Conduct, narrative, zoning, chair, oath, formality, expertise, burden of persuasion, presiding officer, residential, audience, effective, shopping center, eastbound, driveway, traffic, particular use, gave evidence, legal issues, prima facie, set forth, reclassification, disqualification, adjudicatory

LexisNexis(TM) HEADNOTES - Core Concepts - + Hide Concepts

- Administrative Law > Judicial Review > Standards of Review > Substantial Evidence Review
- In a review of an administrative ruling, an appellate court reviews the issues as does a circuit court, that is, was there substantial evidence in the record as a whole to support the board's findings and conclusions.
- Administrative Law > Judicial Review > Standards of Review > Standards Generally

 HN2 A court's role in reviewing an administrative agency adjudicatory decision is

 narrow. It is limited to determining if there is substantial evidence in the record as
 a whole to support the agency's findings and conclusions, and to determine if the
 administrative decision is premised upon an erroneous conclusion of law.
- Administrative Law > Judicial Review > Standards of Review > Substantial Evidence Review
- In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it; the agency's decision is prima facie correct and presumed valid, and it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.
- Administrative Law > Judicial Review > Standards of Review > Standards Generally

 **A court's task on review of an administrative agency adjudicatory decision is not to substitute its judgment for the expertise of those persons who constitute the administrative agency. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected. Legislative delegations of authority to administrative agencies will often include the authority to make significant discretionary policy determinations.
- Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances

 HN5 The appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.
- Legal Ethics > Professional Conduct > Tribunal

 HN6 See Md. R. Prof. Conduct 3.7(a).
- Governments > Courts > Judicial Precedents
- It is presumed that judges know and apply the law. That doctrine can be expanded to a presumption that judges likewise are cognizant of the Maryland Rules of Professional Conduct.
- Legal Ethics > Professional Conduct > Tribunal

 HN8

 Reported cases, and the Maryland Rules of Professional Conduct, draw a distinction between counsel's conduct in trials before courts of record and hearings conducted

by legislative or adjudicatory bodies. A "trial" is a judicial examination and determination of issues between parties to an action. A "hearing," in comparison, is a proceeding of relative formality with definite issues of fact or of law to be tried. It is frequently used in a broader and more popular significance to describe whatever takes place before magistrates and to hearing before administrative agencies.

Administrative Law > Agency Adjudication > Hearings

Legal Ethics > Professional Conduct > Tribunal

In representation before bodies such as executive and administrative agencies, lawyers present facts, formulate issues and advance argument in the matters under consideration. Legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

Administrative Law > Agency Adjudication > Hearings

Legal Ethics > Professional Conduct > Tribunal

There exists a distinction between a "trial" and a "hearing" in the applicability of the Maryland Rules of Professional Conduct. The rules do not preclude the giving of evidence by an attorney of record for a party before an administrative agency. However, the evidence given by an attorney in those circumstances does have to be under oath, and cannot be given by way of statement or narrative as an advocate, rather than as a sworn witness. It is imperative that evidence given before an adjudicatory body be under oath, whether from an attorney or lay person, a lay witness or an expert witness.

Administrative Law > Agency Adjudication > Hearings

Proceedings before administrative agencies are routinely conducted with less formality than are trials in a court of record. The degree of formality will ordinarily be directly proportional to the complexity of the subject matter before the hearing agency. Or, put another way, one would expect greater formality at a federal cabinet level administrative agency hearing than at a hearing before a municipal zoning commission. Nonetheless, the better practice before administrative boards and agencies is for the presiding officer to be certain that each witness is sworn and identified individually as that witness takes the witness chair. It is incumbent upon a presiding officer to maintain an orderly process in the interest of fairness to all parties to the litigation, as well as to persons whose direct, or indirect, interests may be affected by the outcome of the proceedings.

Administrative Law > Agency Adjudication > Hearings

An acceptable alternative to the individual swearing of witnesses at an administrative hearing would be to administer the oath to all prospective witnesses at the outset of the hearing and to then be certain that each is clearly identified by name at the time they speak. Of course, even that practice presents the risk of a person in a large audience speaking extemporaneously and without having first been sworn.

Administrative Law > Agency Adjudication > Hearings

In all cases before an administrative agency it is important that the presiding officer be certain that witnesses are properly sworn and identified and that the record does not contain unsworn comments by unidentified persons. It is equally important that documents and other exhibits be carefully identified and cataloged in the record. An accurate record is essential for comprehensive and effective judicial review, both at the trial court and appellate levels, for at each level the scope of review is the same: the reviewing court considers the record made before the board or agency. An orderly and accurate record will facilitate both fairness

and judicial economy.

Show Headnotes

COUNSEL: ARGUED BY William C. Wantz of Hagerstown, MD FOR APPELLANTS.

ARGUED BY Roger Schlossberg (Thomas M. Digirolamo and Schlossberg & Degirolamo on the brief) all of Hagerstown, MD. FOR APPELLEE.

JUDGES: ARGUED BEFORE HOLLANDER, SHARER, and THIEME (Raymond G., Jr.), Retired, specially assigned, JJ. Opinion by SHARER, J.

OPINIONBY: Sharer

OPINION: [*697] [**349]

Appellants, John A. Heard, Jr. and David A. Leather, appeal from a decision of the Circuit Court for Washington County affirming a decision of the Washington County Board of Appeals (the "Board"), granting a special exception to appellee, **Foxshire** Associates, LLC. **Foxshire** applied for a special exception to extend the entrance to a retail shopping center owned by **Foxshire** through a subdivided residential lot, also owned by **Foxshire**, adjacent to the shopping center.

Appellants raise the following questions on appeal:

- 1. Did the Board err in granting a special exception, permitting the establishment of a commercial shopping center use in a residential zoning district? [*698]
- 2. Was the Board's grant of a special exception supported by substantial evidence in the record? [**350]

Because we conclude that the evidence before the Board was insufficient to support the granting [***2] of the special exception, we shall reverse and remand to the Board of Appeals.

FACTUAL BACKGROUND

Foxshire is the owner of a tract of land abutting U.S. Route 40, east of the City of Hagerstown, in Washington County. Located on the land is a commercial property known as **Foxshire** Plaza Shopping Center (the "Plaza"), which is in a "BG" (Business, General) zoning district as defined by the Washington County zoning ordinance. **Foxshire** also owns an adjoining undeveloped lot (the "Lot"), which is zoned "RU" (Residential, Urban District). The use of that lot is the subject of this appeal.

The Plaza is located on the south side of U.S. Route 40. Principal access to the Plaza is from Route 40 eastbound, allowing uncomplicated entry from the west. Potential customers of the Plaza approaching from the east, however, must pass the Plaza, go to the traffic light at the next intersection, make a left U-turn onto eastbound Route 40, and return east to the Plaza entrance.

The Lot lies within the Rolling Green Acres Subdivision, which is adjacent to the Plaza property. n1 The Lot abuts Beverly Drive to the south, a local road that intersects with Route 40. A median crossover permits westbound [***3] Route 40 traffic to turn left onto Beverly Drive. Traffic from Beverly Drive, however, is not permitted to cross eastbound Route 40 to proceed west on Route 40.

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n1 Although not the subject of this appeal, appellants mention in a footnote in their brief that all of the lots in Rolling Hills, including the one owned by **Foxshire**, are subject to covenants which restrict the use of properties in the subdivision to single-family residential purposes.

Both appellants own, and reside in, single-family residences on Beverly Drive. The rear yards of both properties abut the Plaza parking lot.

On August 4, 2000, **Foxshire** sought approval of the Washington County Engineering Department to provide additional ingress to the Plaza by constructing a driveway through the lot owned by it in Rolling Green Acres. In response, Gary Hebb, the Engineering Department Plan Refiner, advised that, because of the RU zoning classification, a special exception would be required. On September 7, 2000, **Foxshire** submitted an application to the [***4] Board of Appeals for a zoning permit to authorize a "special exception to construct a commercial access road across the property which is zoned residential to the **Foxshire** Plaza Shopping Complex."

On September 27, 2000, the Board conducted a public hearing on the application and, thereafter, granted the special exception. Appellants appealed the Board's decision to the circuit court which, after hearing oral argument, affirmed in a written opinion and order of May 29, 2001. Appellants have noted a timely appeal. We will supply additional facts as necessary in our discussion of the issues presented for review.

STANDARD OF REVIEW

HN1 In this review of an administrative ruling, we review the issues as did the circuit court; that is, was there substantial evidence in the record as a whole to support the Board's findings and conclusions. The Court of Appeals stated in <u>Board of Physician Quality Assurance</u> v. Banks, 354 Md. 59, 729 A.2d 376 (1999), the standard of review for appellate courts of administrative agencies: [**351]

*HN2**A court's role in reviewing an administrative agency adjudicatory decision is narrow, United Parcel v. People's Counsel, 336 Md. 569, 576, 650 A.2d 226, 230 (1994); [***5] it "is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." United [*700] Parcel, 336 Md. at 577, 650 A.2d at 230. See also Code (1984, 1995 Repl. Vol.), § 10-222(h) of the State Government Article; District Council v. Brandywine, 350 Md. 339, 349, 711 A.2d 1346, 1350-51 (1988); Catonsville Nursing v. Loveman, 349 Md. 560, 568-569, 709 A.2d 749, 753 (1988).

HN3In applying the substantial evidence test, a reviewing court decides "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Bullock v. Pelham Wood Apts., 283 Md. 505, 512, 390 A.2d 1119, 1123 (1978). See *Anderson v. Dep't of Public Safety, 330 Md. 187, 213, 623 A.2d 198, 210 (1993). A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. *CBS v. Comptroller*, 319 Md. 687, 698, 575 A.2d 324, 329 (1990). A reviewing court "must review the agency's *[***6]* decision in the light most favorable to it; ... the agency's decision is prima facie correct and presumed valid, and ... it is the agency's province to resolve conflicting evidence' and to draw inferences from that evidence." *CBS v. Comptroller*, supra*, 319 Md. at 698, 575 A.2d at 329, quoting *Ramsay*, Scarlett & Co. v. Comptroller*, 302 Md. 825, 834-835, 490 A.2d 1296, 1301 (1985). See *Catonsville Nursing*

v. Loevman, supra, 349 Md. at 569, 709 A.2d at 753 (final agency decisions "are prima facie correct and carry with them the presumption of validity").

Despite some unfortunate language that has crept into a few of our opinions, HN4 a "court's task on review is not to ""substitute its judgment for the expertise of those persons who constitute the administrative agency,'"" *United Parcel v. People's Counsel, supra,* 336 Md. at 576-577, 650 A.2d at 230, quoting *Bullock v. Pelham Woods Apts., supra*, 283 Md. at 513, 390 A.2d at 1124. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation [***7] and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Lussier v. Md. Racing Commission, 343 Md. 681, 696-697, 684 A.2d 804, [*701] 811-812 (1996), and cases there cited; McCullough v. Wittner, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is ... entitled to weight"). Furthermore, the expertise of the agency in its own field should be respected. Fogle v. H & G Restaurant, 337 Md. 441, 455, 654 A.2d 449, 456 (1995); Christ [ex rel. Christ] v. Department of Natural Resources, 335 Md. 427, 445, 644 A.2d 34, 42 (1994) (legislative delegations of authority to administrative agencies will often include the authority to make "significant discretionary policy determinations"); Bd. of Ed. For Dorchester Co. v. Hubbard, 305 Md. 774, 792, 506 A.2d 625, 634 (1986) ("application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the" legal issues).

Board of Physician Quality Assurance, supra, 354 Md. at 67-69 [***8] (footnotes omitted). [**352]

DISCUSSION

Because we conclude that the lack of sufficient evidence is dispositive of this appeal, we shall discuss appellant's second issue at the outset.

Appellants contend that **Foxshire** failed to adduce substantial evidence before the Board to support the conclusion that the proposal met the prescribed standards and requirements for the grant of a special exception as set forth in <u>Schultz v. Pritts</u>, 291 Md. 1, 432 A.2d 1319 (1981) and, as a result of this failure, the Board erred in granting the special exception.

In Schultz, the Court of appeals held that **The appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

[*702]

<u>Schultz, supra, 291 Md. at 15.</u> With that standard as our guidepost, we must review the record made before the Board to determine [***9] the nature of the evidence and whether or not it satisfies the substantial evidence requirement.

The hearing of the Board of Appeals was called to order by Robert C. Veil, Jr., the chair. The record reveals that the chair called for "... all of those who will testify, [to] stand where you are, please, raise your right hand." The record notes that "(WHEREUPON, all potential witnesses were duly sworn.)" The following then ensued:

CHAIRMAN VEIL: Thank you. Be seated, please. Mr. Strasburg, any opening you'd like to make?

OPENING STATEMENT BY MR. STRASBURG. n2

| |
|---|
| n2 "Mr. Strasburg" was, in fact, Roger Schlossberg, counsel for Foxshire. His name is misspelled throughout the transcript of the Board hearing. |
| |

After having been recognized by the chair, Schlossberg proceeded to offer a substantial narrative of his client's proposed use of the RU lot for the construction of an alternative access to the Plaza.

At the conclusion of the Schlossberg narrative, Russell E. Townsley, a representative of Fox & Associates, [***10] an engineering and planning firm, was called as a witness for the applicant. His testimony consisted primarily of responses to questions from the Board chair and persons in the audience. The latter were, presumably, opponents of the application. Townsley's testimony was essentially limited to explanations of the intended use of the driveway and means by which its creation could be made more attractive and more palatable to nearby residential neighbors. He discussed, for example, that the driveway would be for ingress only, that trucks would be prohibited, and that adequate trees and other "buffers" would be installed. He did not discuss the engineering feasibility of the project; nor did he discuss, or refer to, traffic studies that might have been pertinent to a justification of the need for the special exception as an aid to highway safety or convenience.

At this juncture it is important to consider the "evidence" presented by counsel for **Foxshire.** Was counsel's narrative actually evidence? Appellants contend that Schlossberg was not a sworn witness, but that his representation was made in response to Chairman Veil's invitation to present "an opening statement." They posit that Schlossberg was not a sworn witness; hence, his words were no more than argument and should not have been taken by the Board as evidence in support of **Foxshire's** burden of persuasion. Appellants raised that question before the circuit court where Schlossberg asserted that he had, in fact, been offered as a sworn witness before the Board. Appellants, in their brief, make the point that the Board relied upon "... the representations of counsel, as though they were evidence, in opening statement" Appellee does not respond, in its brief, to the question of whether Schlossberg was, in fact, a sworn witness.

Counsel as Witness

Within the issues presented in this appeal there arises a sub-issue of the competency of an attorney for a party to give evidence before an administrative agency. Our research has led us to several cases in which counsel for a [***12] zoning applicant have given what was referred to as "evidence" or "testimony."

In Baker v. Montgomery County, 241 Md. 178, 215 A.2d 831 (1966), the Court of Appeals

reversed the Circuit Court for Montgomery County, which had affirmed the granting of an application for reclassification. The Court's reversal was founded upon insufficiency of the evidence. After noting that "the only person who 'testified' in favor of the requested rezoning at the council hearing was the attorney for the applicant" and that the record did not support the granting of the re-classification, the Court reversed.

[*704] Later, in <u>Cason v. Board of County Comm'rs</u>, 261 Md. 699, 276 A.2d 661 (1971), wherein counsel for the applicant apparently gave evidence to the agency, as a witness, the Court of Appeals, responding to a contention that "... evidence offered by counsel for the applicant ..." was insufficient, stated:

In *Baker*, we did not reverse the action of the Montgomery County Council in granting a reclassification because the evidence before it was given by applicant's attorney, but because there was no evidence produced to establish that there had been a change in [***13] conditions since the last comprehensive rezoning resulting in a change in the character of the neighborhood to justify the rezoning, there being no contention in *Baker* that there had been a mistake in the original zoning. Evidence produced before the legislative body may be through the attorney for the applicant, there being no disqualification of counsel for the applicant, as such, to give evidence.

Cason, supra, 261 Md. at 708 (emphasis supplied).

It is not clear, in either *Cason* or *Baker*, that the attorney who "gave evidence" or "testified" did so under oath as a witness, or whether the information offered by counsel was by way of statement or argument.

This Court had the opportunity to consider the effect of counsel as witness in <u>Richmarr v.</u> <u>American PCS, 117 Md. App. 607, 701 A.2d 879 (1997).</u> After observing that "the final 'witness' in the applicant's case-in-chief ... was its attorney," Judge Harrell then offered the following footnote:

The transcript of the 22 August 1995 hearing did not list APC's attorney as [**354] one of the counsel entering their appearance She was listed as a witness, though she clearly identified [***14] herself as APC's engaged counsel for purposes of the special exception petition. All prospective witnesses were sworn en mass at the beginning of the hearing. It is by no means clear that she testified as a witness, rather than offering argument as attorneys are inclined to do. Even as a witness, no particular field of expertise, such as [*705] urban or land planning, was ascribed to or claimed by her. We shall leave to another case a more particularized exploration of whether counsel representing a party in a zoning matter should testify as a fact or opinion witness and, if so, what weight such apparently non-expert opinion testimony should be accorded.

Richmarr, supra, 117 Md. App. at 622 n.11.

Intertwined with the issue of competency of counsel for a party to testify is the question of the effect of Rule 3.7 of the Maryland Rules of Professional Conduct (MRPC), adopted by the Court of Appeals, effective January 1, 1987, which provides that **M6***(a) [a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...." The rule contains several exceptions, none of which is applicable here. There is an abundance of cases in which [***15] the question has been considered in the context, and usually during the course, of trials of contested matters before a court of record, both civil and criminal, or upon pre-trial motions to disqualify counsel of opposing parties. In Maryland, for example, see *Medical Mutual Liability Ins. Soc'y v. Evans, 330 Md. 1, 622 A.2d 103 (1993) and *Harris v. Harris, 310 Md. 310, 529 A.2d 356 (1987). In *Columbo v. Puig, 745 So. 2d 1106 (Fla. Dist. Ct. App. 1999)* the court considered the phrase "at a trial" as contained in the Florida Bar Rule 4-3.7 (similar in wording to MRPC 3.7) and distinguished pre-trial and

post-trial procedure from the trial on the merits. Generally, see Alois Valerian Gross, Annotation, Attorney as Witness for Client in Civil Proceedings, 35 A.L.R.4th 810 (1985).

However, there is a dearth of cases relating to the issue before us here - whether an attorney for a party should give evidence on behalf of that client at an administrative hearing. In addition to *Baker*, *Cason*, and *Richmarr*, referred to, *supra*, courts in other jurisdictions have reached disparate results. In *Robinhood Trails Neighbors v. Winston-Salem Zoning Bd.*, 44 N.C. App. 539, 261 S.E.2d 520 (1980), [***16] the court rejected a contention that evidence given by counsel for the applicant was not competent and could not contribute to satisfaction of the substantial evidence requirement. In *Mebane* [*706] *v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27, 220 S.E.2d 623 (1975), the court held the attorney-witness to be competent to testify for a client/party before a local administrative agency, but discouraged the practice in light of the code of professional responsibility.

The American Bar Association Code of Professional Ethics was adopted by the Court of Appeals in 1970 and codified as Maryland Rule 1230. Subsequently, as we have noted, the Court adopted the present MRPC to be effective January 1, 1987. Md. Rules, Appendix, Rules of Professional Conduct, editor's note (2002). The precursor to current Rule 3.7 in the 1970 Code of Professional Conduct was Disciplinary Rule (DR) 5-102(B), which required that

[a] lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake [**355] the employment and he or a lawyer in his firm may testify

Thereafter [***17] are set forth essentially the same exceptions that attach to present Rule 3.7, none of which are applicable to the case sub judice.

We point out the existence, in 1971, of a rule of similar import to present Rule 3.7 to demonstrate that, at the time that the decision in <u>Cason v. Board of County Comm'rs, supra,</u> authorized by Judge Wilson K. Barnes, came down on May 5, 1971, potential disqualification of counsel as witness was considered and rejected. HN7*It is presumed that judges know and apply the law. <u>North River Ins. Co. v. Mayor & City Council of Baltimore</u>, 343 Md. 34, 90, 680 A.2d 480 (1996). That doctrine can be expanded to a presumption that judges likewise are cognizant of the Rules of Professional Conduct.

Reported cases, and the Rules of Professional Conduct, draw a distinction between counsel's conduct in trials before courts of record and hearings conducted by legislative or adjudicatory bodies. A "trial" is "a judicial examination and determination of issues between parties to an action." BLACK'S LAW DICTIONARY 1348 (5th ed. 1979) (quoting Gulf, C. & [*707] S. F. Ry. Co. v. Smith, 1954 OK 145, 270 P.2d 629, 633 (Okla. 1954)). A "hearing", [*18] in comparison, is a "proceeding of relative formality ... with definite issues of fact or of law to be tried. It is frequently used in a broader and more popular significance to describe whatever takes place before magistrates ... and to hearing before administrative agencies." Id. at 649.

The comment to MRPC 3.9 notes that

HN9*in representation before bodies such as ... executive and administrative agencies ... lawyers present facts, formulate issues and advance argument in the matters under consideration ... legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

Md. Rules, Appendix, Rules of Professional Conduct, Rule 3.9 cmt. (2002).

We conclude, therefore, that HN10* there exists a distinction between a "trial" and a "hearing"

in the applicability of the Rules of Professional Conduct. We further conclude that the MRPC does not preclude the giving of evidence by an attorney of record for a party before an administrative agency. However, we do not say that the evidence given by an attorney in those circumstances does not have to be under oath, or that it can be given by way of statement or narrative as [***19] an advocate, rather than as a sworn witness. It is imperative that evidence given before an adjudicatory body be under oath, whether from an attorney or lay person, a lay witness or an expert witness.

We cannot conclude from the record that Schlossberg was sworn as a witness and that the words he spoke were spoken under oath. Because the record does not tell us that he was a sworn witness, we conclude that he was not. Therefore, we consider what he told the Board to have been argument and not evidence that the Board ought to have considered in its fact finding function. Nor, in fact, can we ascertain from the transcript who among the other persons who "testified" was sworn as a witness.

[*708] Having discounted the Schlossberg narrative as evidence, we again examine the record to determine what, in fact, was presented to the Board as evidence. We, and the Board, are left only with the observations of Townsley who, as we have noted, did not offer substantive evidence about "... whether there are facts and circumstances that show that the particular use proposed ... would have any adverse effects above and beyond those inherently [**356] associated with such a special exception use " <u>Schultz, supra, 291 Md. at 11.</u> [***20] While **Foxshire** met its burden of production, it clearly failed in meeting its burden of persuasion. See <u>Angelini v. Harford County, 144 Md. App. 369, 798 A.2d 26 (2002).</u>

Our position is consistent with this Court's opinion in <u>Chester Haven Beach Partnership v.</u> <u>Board of Appeals of Queen Anne's County, 103 Md. App. 324, 653 A.2d 532 (1995).</u> There, the local board of appeals denied an application for variance under the local zoning ordinance. At the hearing before the board of appeals, most of the information presented to the board was by way of an opening statement by counsel for the applicant. The board denied the application and the circuit court affirmed. On appeal, Judge Cathell noted that there was scant evidence before the board to support the applicant's burden of persuasion and, absent sufficient evidence, the opening statement of counsel would not carry the burden of persuasion.

Because we have discounted the Board's reliance upon the "evidence" presented by **Foxshire's** counsel in opening statement, and because there remains only the scant observations of Townsley, we hold that the evidence before the Board was neither [***21] substantial nor sufficient to support its factual findings. Therefore, we shall reverse.

Having done so, we decline to consider whether the Board erred, as a matter of law, in granting appellee's application for special exception.

We recognize that **Proceedings before administrative agencies are routinely conducted with less formality than are trials in a court of record. The degree of formality will ordinarily [*709] be directly proportional to the complexity of the subject matter before the hearing agency. Or, put another way, one would expect greater formality at a federal cabinet level administrative agency hearing than at a hearing before a municipal zoning commission.

Nonetheless, we observe that the better practice before administrative boards and agencies is for the presiding officer to be certain that each witness is sworn and identified individually as that witness takes the witness chair. It is incumbent upon a presiding officer to maintain an orderly process in the interest of fairness to all parties to the litigation, as well as to persons whose direct, or indirect, interests may be affected by the outcome of the proceedings.

HN13*In all cases it is important that the presiding officer be certain that witnesses are properly sworn and identified and [*710] that the record does not contain unsworn comments by unidentified persons. It is equally important that documents and other exhibits be carefully identified and cataloged in the record.

An accurate record is essential for comprehensive and effective judicial review, both at the trial court and appellate levels, for at each level the scope of review is the same: the reviewing court considers the record made before the board or agency. An orderly and accurate record will facilitate both fairness and judicial economy.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO VACATE THE DECISION OF THE WASHINGTON COUNTY BOARD OF APPEALS.

COSTS SHALL BE PAID BY APPELLEES.

Source: <u>Legal</u> > / . . . / > MD State Cases, Combined **(i)**

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Citing Decisions:

Citing decisions with no analysis assigned (1)

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CITING DECISIONS (1 citing decision)

MARYLAND COURT OF SPECIAL APPEALS

1. Cited by:

Harford County People's Counsel v. Bel Air Realty Assocs. Ltd. P'shp, 148 Md. App. 244, 811 A.2d 828, 2002 Md. App. LEXIS 203 (2002)

148 Md. App. 244 <u>p.258</u> 811 A.2d 828 <u>p.836</u>

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| Location (by Carl) SELS Latay ette Ave | ,500' N. Woodsdale K |
| Zoning: DR 5 5 Acreage: 399 Prev | vious Hearing Listed With Decision |
| Election District 1 Councilmanic District 1 | Case # |
| Check to See if the Subject Site or Request is: CBCA Floodplain No Elderly No Historical No (MPCNO) | |
| | |
| ທີ່ທີ່ ໜ້າ Elderly ນວ | KIN X W |
| What Historical No (MPLAN) | (0) My (0) |
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Date/Accepted for Filing

Item Number Assigned

Robert L. Ehrlich, Jr. Governor



Andrey E Scott Secretary

Florence E. Burlan
Deputy Secretary

Michael S. Steele Lt. Governor

July 1, 2003

Ms. Rebecca Hart
Baltimore County Department of Permits and Development Management
County Office Building
111 West Chesapeake Avenue
Room 111, Mail Stop # 1105
Towson MD 21204

Re: Zoning Advisory Committee Agenda, 07/07/03 re: case numbers 03-577-A, 03-578-A, 03-579-SPH, 03-580-SPHA, 03-583-A, 03-584-A, 03-585-SPHXA, 03-586-SPH, 03-587-A, 03-588-A, 03-589-SPH, 03-590-A, 03-591-A, 03-592-A, 03-593-A, 03-594-A, 03-595-SPH, 03-596-SPH, 03-597-A/03-598-SPHA, 03-599-A, 03-600-HAS & 03-601-A

Dear Ms. Hart:

The Maryland Department of Planning has received the above-referenced information on 07/01/03. The information has been submitted to Mr. Mike Nortrup.

Thank you for your cooperation in this review process. Please contact me at 410.767.4550 or the above noted reviewer if you have any questions.

Sincerely,

James R. Gatto

Manager

Metropolitan Planning

Planning Services

cc: Mike Nortrup

PLEASE PRINT CLEARLY

| | NAME | MAS | CARI | |
|------|--------|-------|-------|----|
| CASE | NUMBER | 03-59 | 8-5PL | HA |
| DATE | 8/0 | マフカろ | | - |

PETITIONER'S SIGN-IN SHEET

| NAME | ADDRI | ESS | CITY, STATE, ZIP | | E- MAIL | | | |
|------------------------------|--------------------------------------|--|------------------|--------------|----------|--|---------------|--------------|
| Howard L. Alderman, Jr, Esq. | Levin & Gann, PA 502 Washington A | ve., Suite 800 | Towson, | MD 21 | 204 | | halderman@Lev | inGann.com |
| Bron G. Macars | 1400 Forest | ~ / ~ ~ ~ | Batt | MAD | 2/2 | ≥ 8 | MGC MAN | D) MSW. Com |
| Stephen Wartill | 10540 York | PA Sute M | Funt | Valley | MD | 21030 | 5the ON | atismatic)/ |
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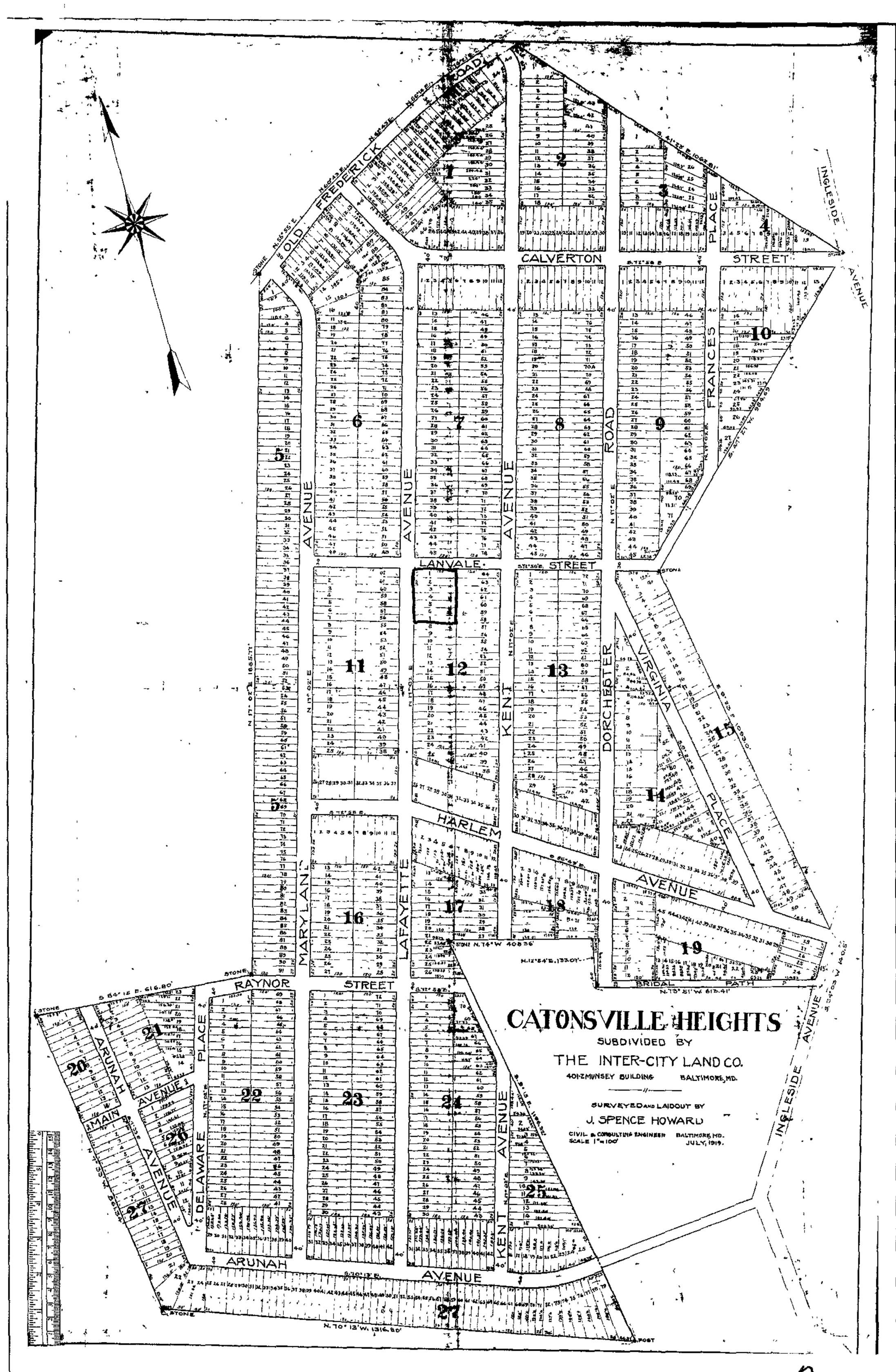
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| CASE | IUMBER_ | |
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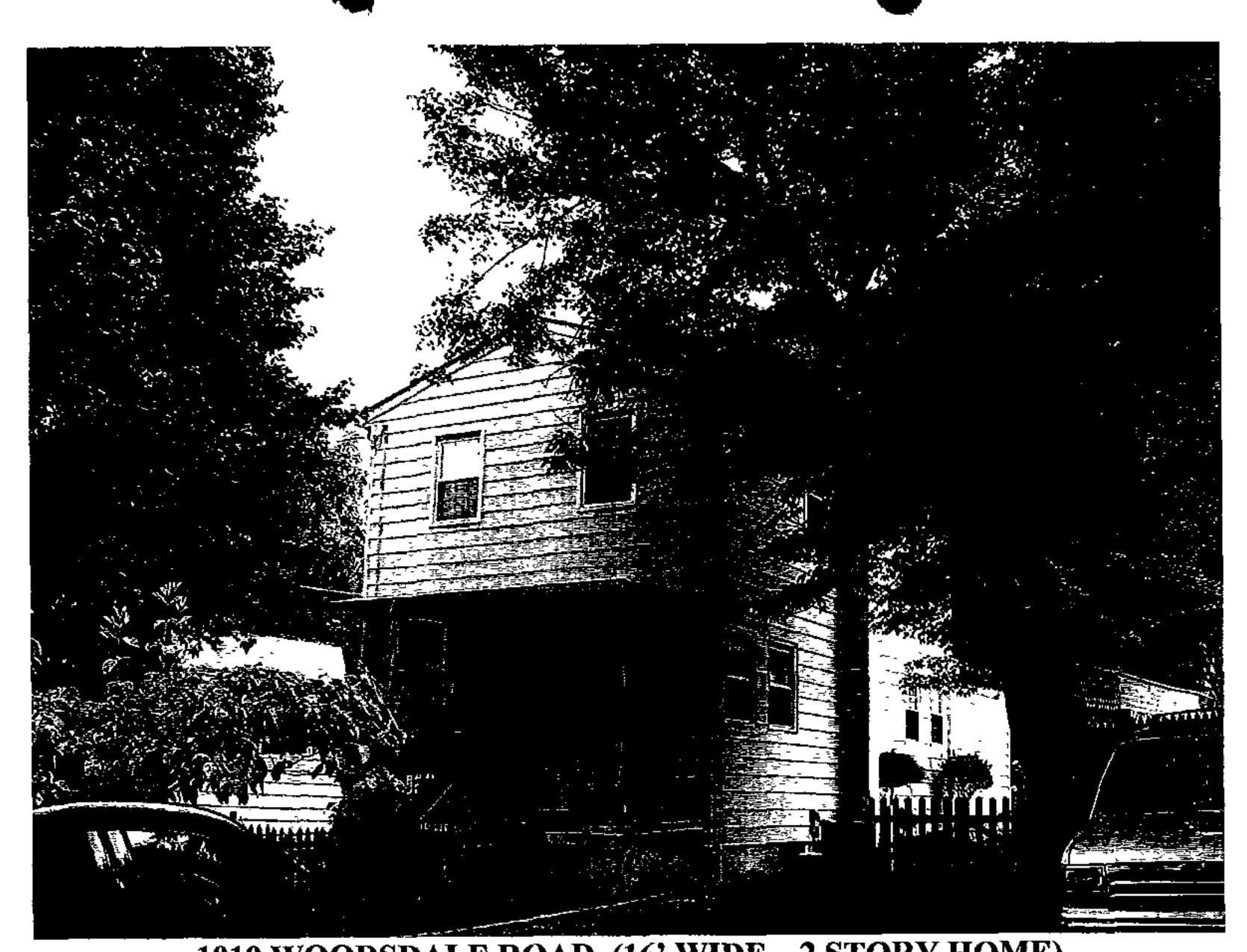
CITIZEN'S SIGN-IN SHEET

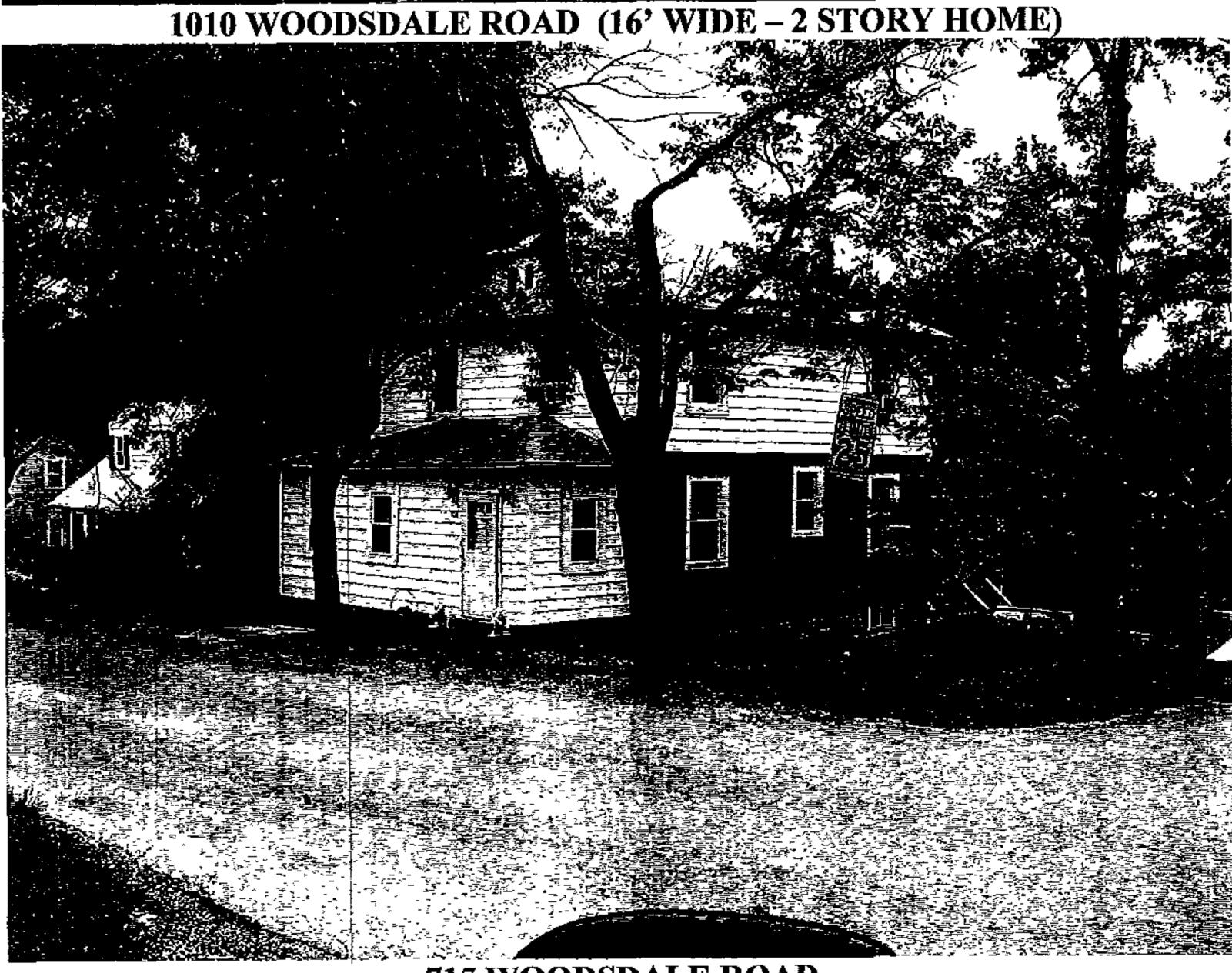
| NAME | ADDRESS | CITY, STATE, ZIP | E- MAIL | |
|---------------|-------------------|----------------------|-----------------------|--|
| DAVID WILFORD | 513 LAFAYETTE AVE | CATONSVILLE MD 21228 | DWILFORDECOMOAST. NET | |
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TIMORE BELTWAY (INTERSTATE 695) -Variable Width R/W for Service Road-SHA Piots 10682, 16713, 17348 BALTIMORE BELTWAY (INTERSTATE 695) PROP. 8" SAN -Variable Widl's R/W for Service Road SHA Plots \10682, 16713, 17348 BLOCK 7 44 - 120.00' S78° 58'00'E TO LANVALE STREET 64 (₆3) 20' -50.0 6 PROP 62 #521 BLOCK 12 61 ENUE 50.0' 8 (60)62#519 145 MHED 61 00 WELLING 58 60) L) N 11.00/00/E #517 7 18. 120.00'\N78° 58'00''W 6 (59)5 5 100 58 57 (5⁴) 7 56) X P



Pet #2

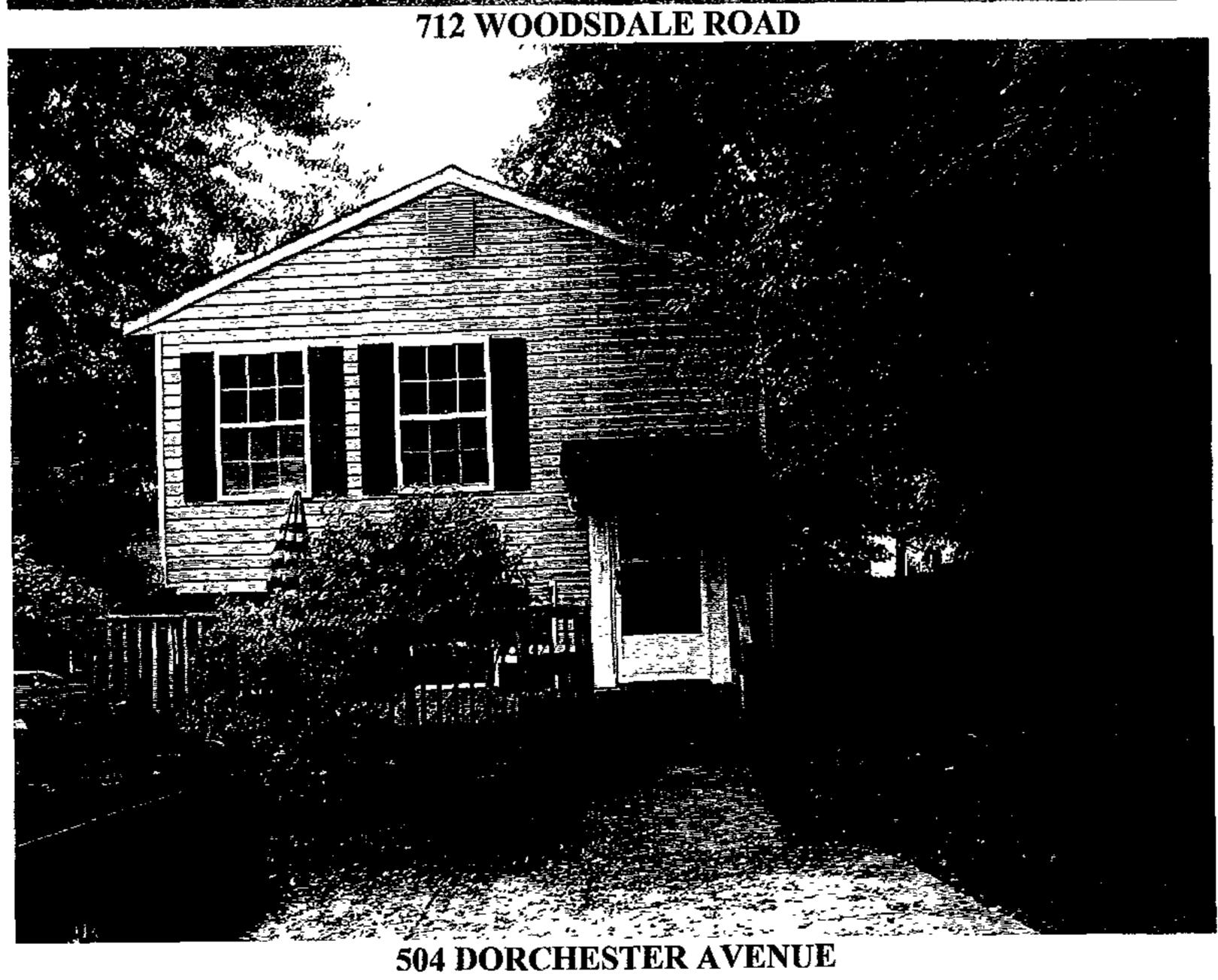


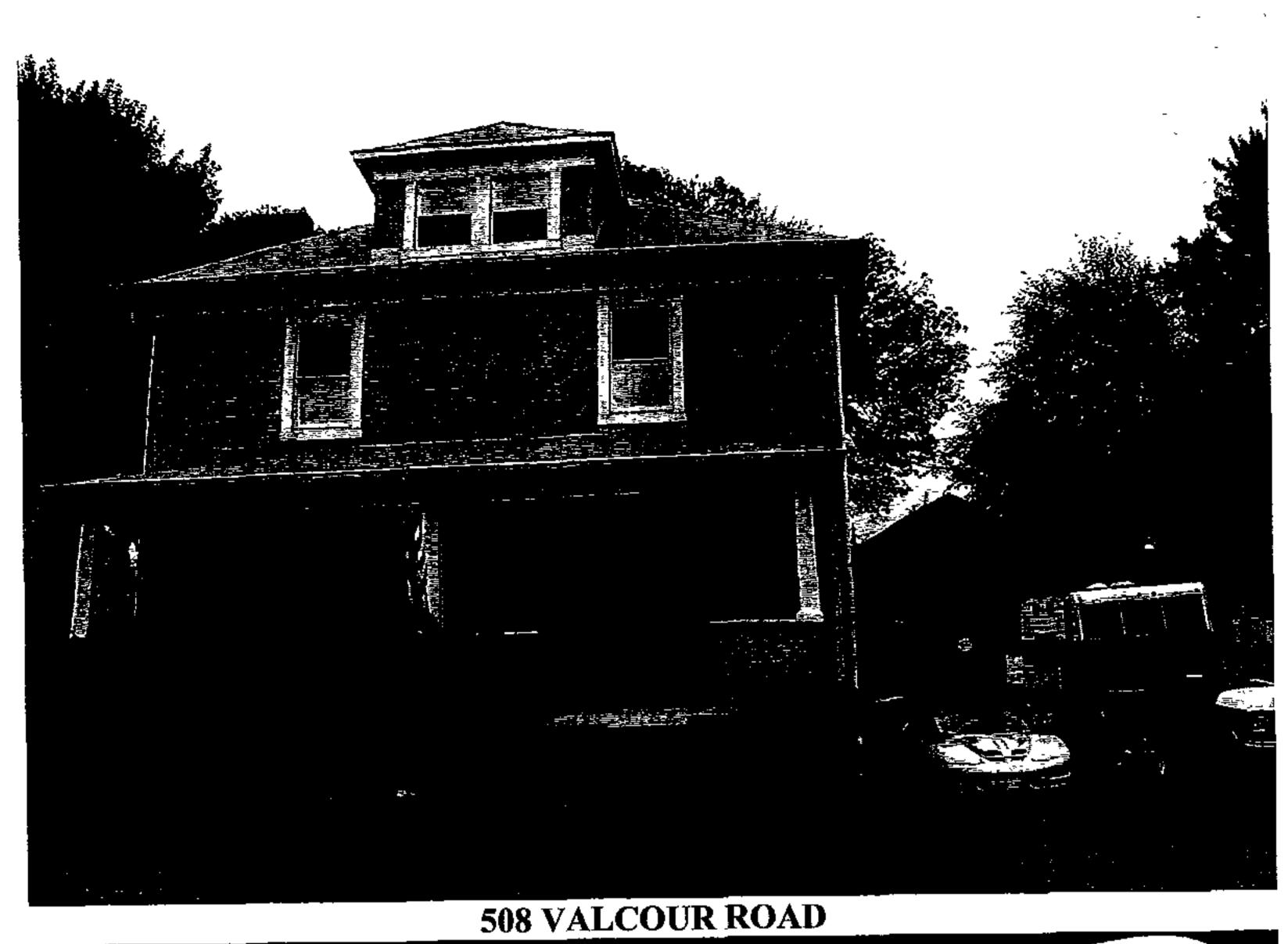


715 WOODSDALE ROAD

Ret #7

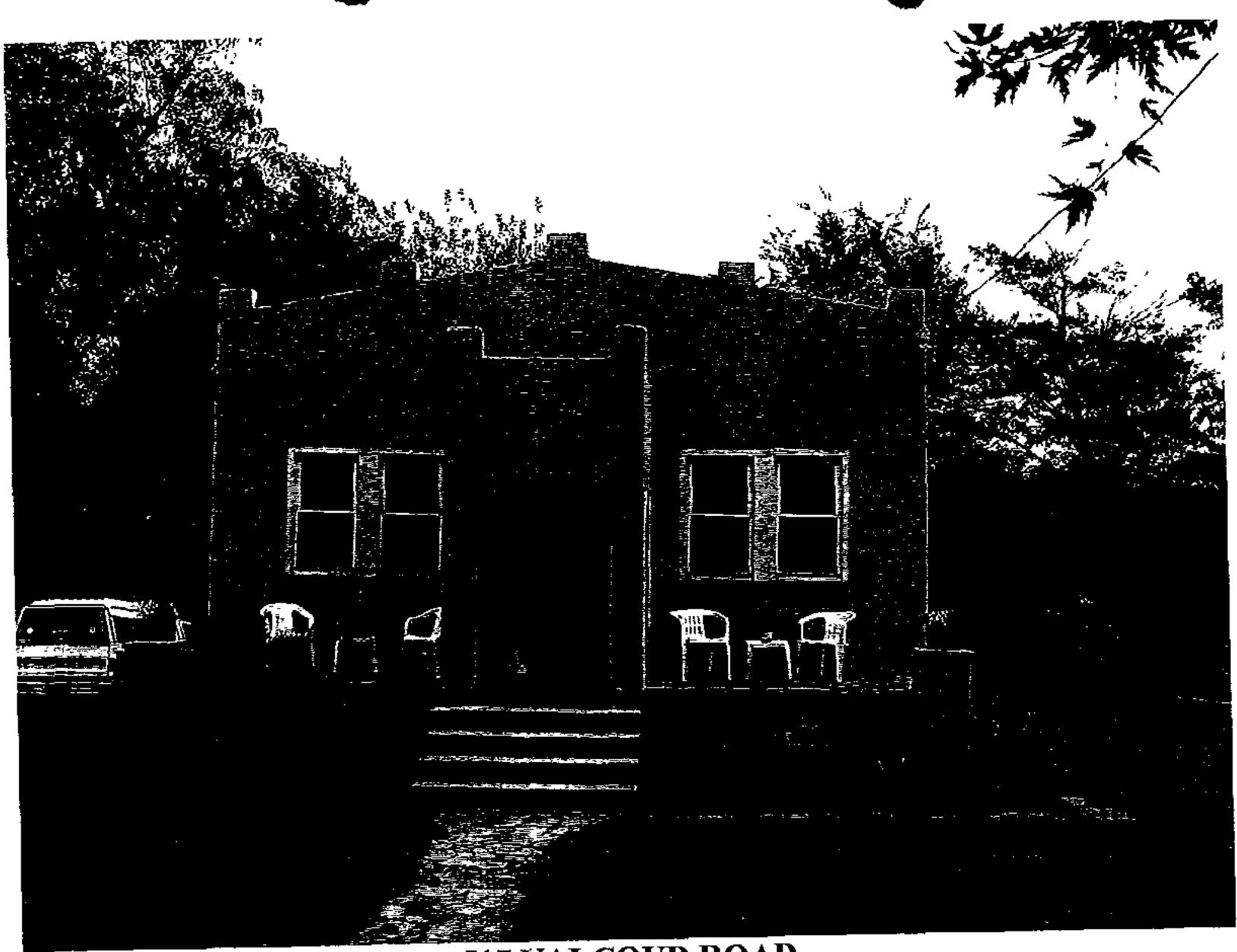


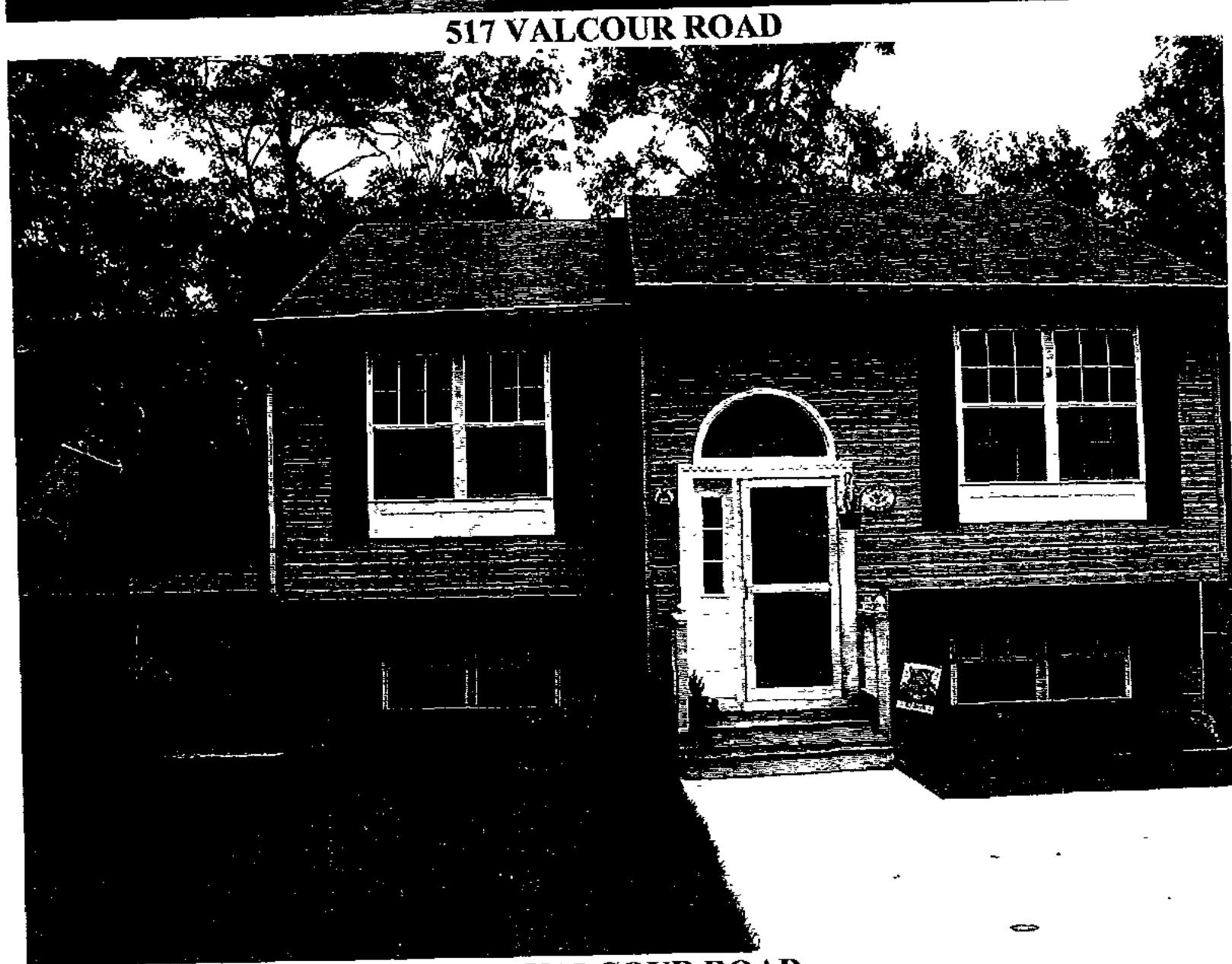




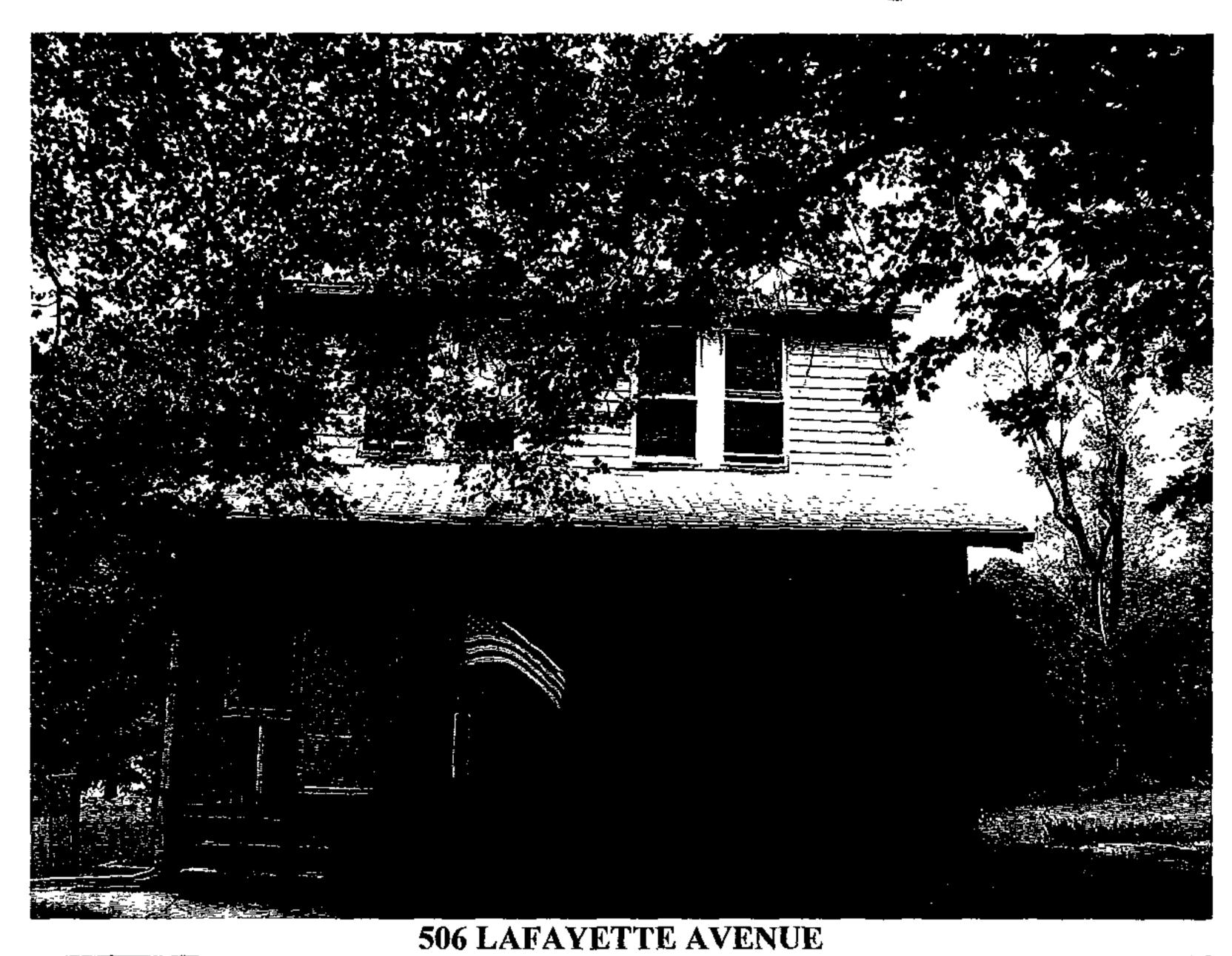
SONVAL COMP. POAD

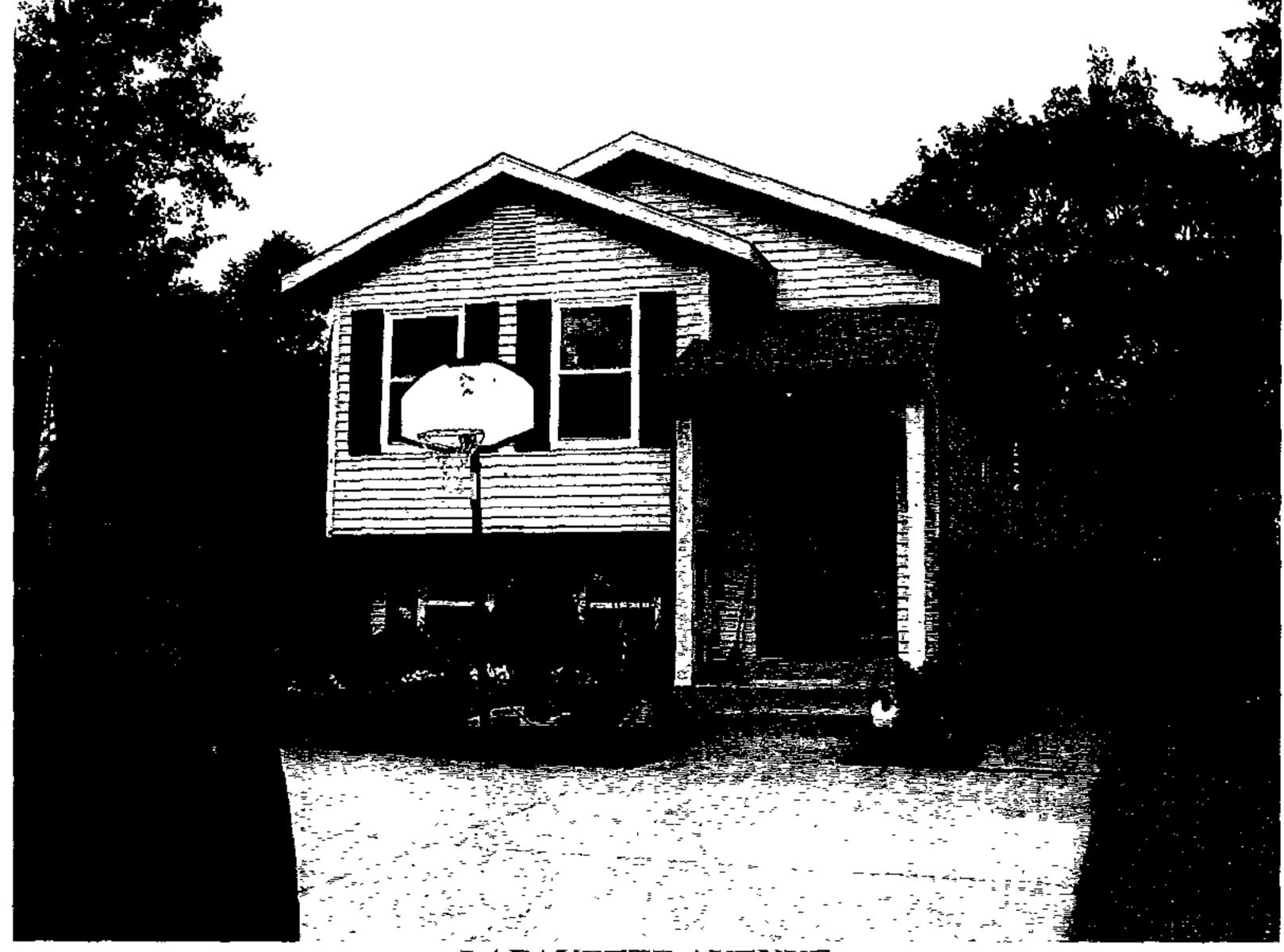
509 VALCOUR ROAD



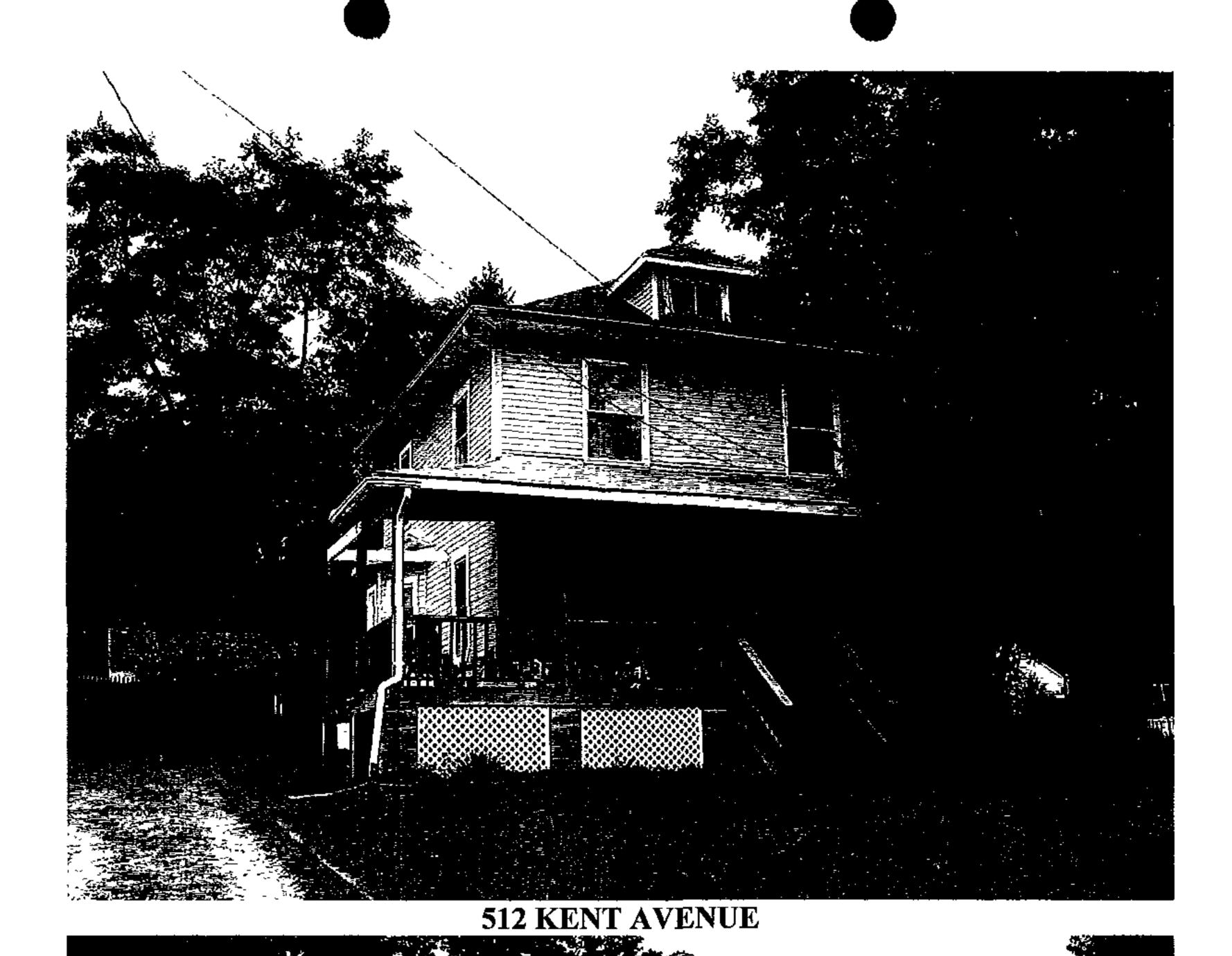


521 VALCOUR ROAD





LAFAYETTE AVENUE



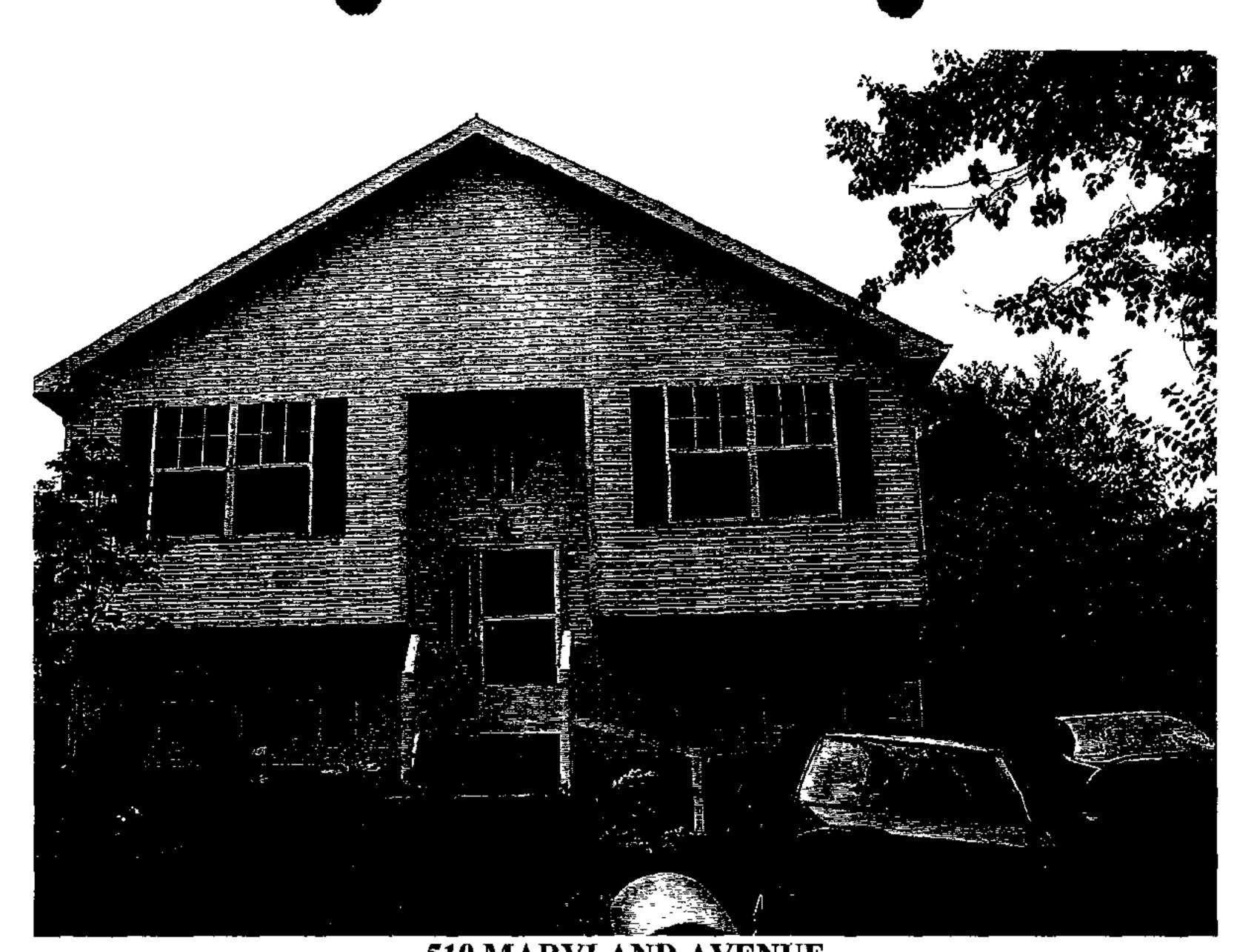


521 KENT AVENUE





LAFAYETTE AVENUE

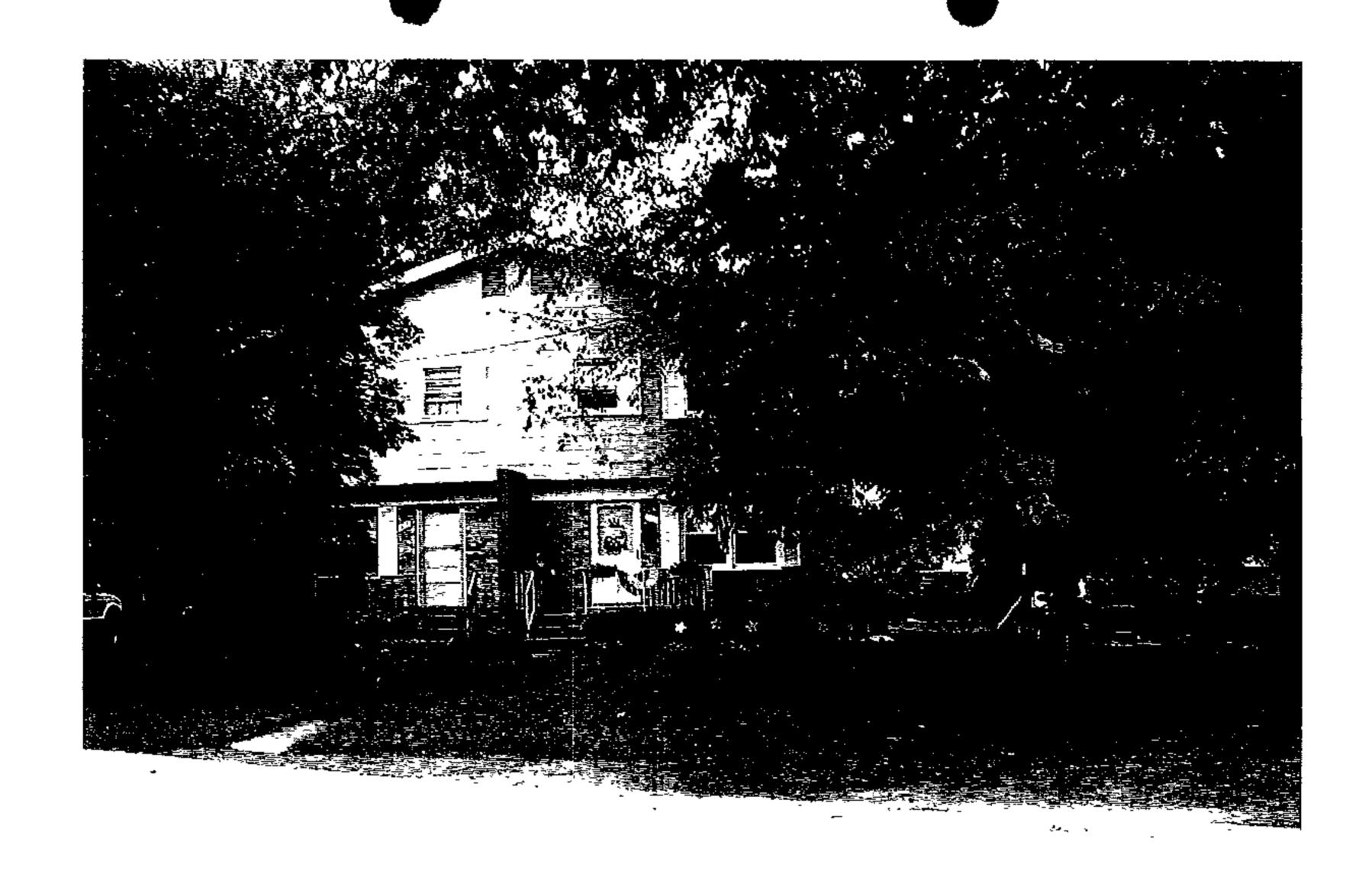




512 MARYLAND AVENUE







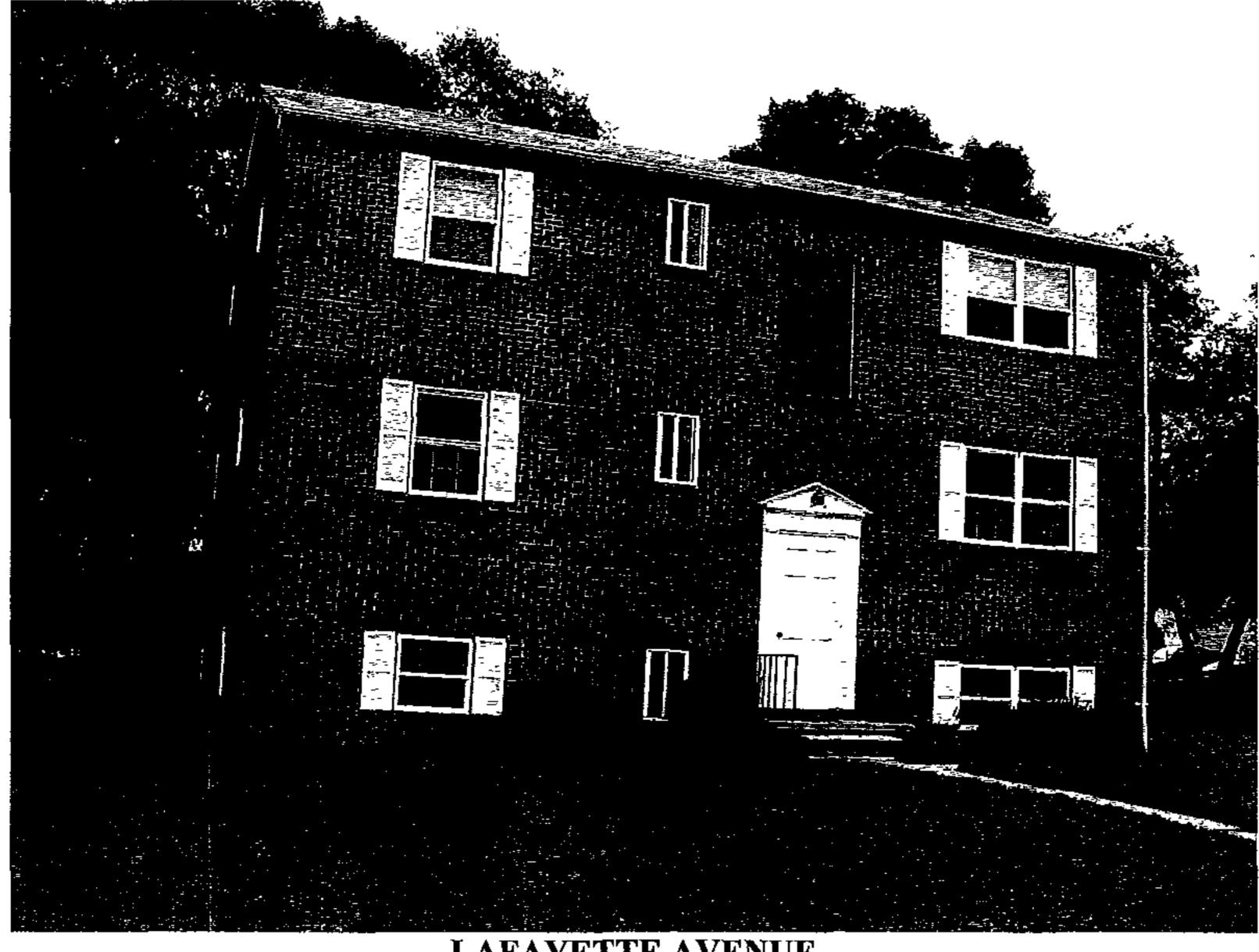
INGLESIDE AVENUE



509 INGLESIDE AVENUE



433 INGLESIDE AVENUE



LAFAYETTE AVENUE

